IN THE

Supreme Court of the United States

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No. 711 and No. 712.

BENJAMIN F. JOHNSON,
Petitioner,
against
MANHATTAN RAILWAY COMPANY *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
of the
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF:

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., RECEIVERS OF INTERBOROUGH RAPID TRANSIT COMPANY.

WILLIAM ROBERTS, RECEIVER OF MANHATTAN RAILWAY COMPANY.

CHARLES HAYDEN AND OTHERS AS A COMMITTEE FOR THE PROTECTION OF THE HOLDERS OF THE TEN-YEAR SIX PER CENT. GOLD NOTES OF INTERBOROUGH RAPID TRANSIT COMPANY.

VAN S. MERLE-SMITH AND OTHERS AS THE PROTECTIVE COMMITTEE FOR MANHATTAN RAILWAY COMPANY CONSOLIDATED MORTGAGE 4% BONDS.

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The petition of Benjamin F. Johnson for a writ of certiorari was served on counsel for the Interborough Receivers

on February 20, 1933. On February 27, 1933, a brief in support of the petition of Johnson (entitled, however, "*Petition* and Brief") was served on counsel for the Receivers by the intervenor Lillian Boehm. This brief is presented in opposition to both the Johnson petition and the Boehm petition.

Statement of Facts.

On August 26, 1932, on the bill of complaint of The American Brake Shoe and Foundry Company (R. 153) and the answer of the Interborough Rapid Transit Company (R. 171), Honorable Martin T. Manton, Senior Circuit Judge of the United States Circuit Court of Appeals for the Second Circuit, holding a District Court of the United States pursuant to designation, appointed Victor J. Dowling and Thomas E. Murray, Jr., temporary Receivers of the Interborough Rapid Transit Company (R. 180).

The order of appointment directed that the parties to the proceeding show cause on the 22nd day of September, 1932, "why the said receivership should not be continued during the pendency of this suit *and upon the hearing thereon any other creditor of the defendant or other party in interest may be heard*" (R. 184).

On September 6, 1932, the Manhattan Railway Company intervened in the proceeding and on its petition (R. 248) William Roberts was appointed a temporary Receiver of the Manhattan Railway Company (R. 196). The order for his appointment also provided that cause should be shown on the 22nd day of September, 1932, as to why that receivership should not be made permanent (R. 200).

Between August 26, 1932, and September 22, 1932, there were numerous interventions in the *Brake Shoe* suit by committees of security holders and an intervention by the Trustee of the First (Consolidated) Mortgage of the Manhattan Railway Company (R. 2, 3).

On September 28, 1932, no objection having been made thereto, the receivership of the Interborough and the receivership of the Manhattan were made permanent *pendente lite* (R. 223). On that day, The Guaranty Trust Company of

New York, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company securing bonds then outstanding in the hands of the public in a principal amount in excess of $132,000,000, was made a party defendant (R. 226).

The petitioner Johnson did not choose to avail himself of the opportunity given by the order of August 26, 1932, to come in on September 22, 1932, in the *Brake Shoe* suit and contest the appointment of the Receivers. Instead, on September 21, 1932, he filed his bill of complaint in the United States District Court against the Manhattan Railway Company, the Interborough and their respective receivers (R. 7, 13). Solely as a stockholder of the Manhattan Railway Company (which had already intervened in the *Brake Shoe* suit) (R. 196), Johnson asserted the right to sue in behalf of that company, the interest of that company in the Interborough situation being that the Interborough was a lessee of all of the property of the Manhattan and was at the time in default in the payment of certain taxes on the Manhattan property, that being one of the items of rent under the lease. As such stockholder of the Manhattan Railway Company, Johnson attacked the validity of the appointment of temporary Receivers of the Interborough and of Manhattan made by Judge Manton, and asked, *inter alia*, for the appointment of other receivers (R. 43).

The bill of complaint in the *Brake Shoe* suit and the answer therein disclosed that the Interborough was in default in a substantial manner under its obligations under its aforesaid First and Refunding Mortgage securing bonds outstanding in the hands of the public in the principal amount of more than $132,000,000, and securing additional bonds in excess of $54,000,000 pledged as security for its Collateral Notes, that it was in default to a substantial degree under the terms of its lease of the elevated railroad of the Manhattan Railway Company, that it was badly in arrears in payment of taxes on its own property, that it had due and owing (or would have due and owing within a few days from the date of the appointment of the Receivers) indebtedness, *which it was*

absolutely unable to pay, for supply bills, rent under the Manhattan lease, principal and interest of funded indebtedness and past due taxes in an amount in excess of $48,000,000 (R. 164, 165).

As was stated by Judge Learned Hand for the Circuit Court of Appeals in the opinion below (R. 1028):

> "The controversy does not touch the substantial relief asked by any of the parties; all acknowledge that the two railways are in such financial straits that a court of equity must take over their assets, to prevent their dismemberment by execution, attachment and the like. *The plaintiffs (referring to Johnson and Bochm), and those who have intervened, ask for receivers, just as do the parties to the American Brake Shoe Company suit.* The dispute touches merely who shall be the receivers, and who the judge to have charge of the receivership. The question at the outset is whether the rules deprive the Circuit Judge of jurisdiction to proceed under the order designating him to hold the District Court." (Italics ours.)

In making the appointment of temporary Receivers and subsequently, on September 28, 1932, making their appointment permanent, Judge Manton acted pursuant to a designation to hold a District Court of the United States for the Southern District of New York, dated August 25, 1932 (R. 177). At that time there was also an outstanding effective designation of Judge Manton to hold a District Court for the Southern District of New York, dated March 20, 1930 (R. 661, fol. 1983).

On October 13, 1932, Judge Woolsey, in the *Johnson* suit, held that by reason of Rules 1-a* and 11-a** adopted on

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* Rule 1-a reads as follows:

"1-a. Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as may be assigned to him by the senior district judge."

** Rule 11-a reads as follows:

"11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy Rules) shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the court and to no other judge."

June 30, 1932, by the eight regularly appointed District Judges of the United States District Court for the Southern District of New York (but without the concurrence therein of the then sitting designated Judges; and of a majority of the Judges of the Circuit Court of Appeals as required by Federal Equity Rule No. 79 [R. 713, fol. 2139]), Judge Manton was entirely without jurisdiction to appoint Receivers, and that his appointment and all orders made by him in the *Brake Shoe* suit were absolutely null and void (R. 694).

On October 18, 1932, Judge Woolsey, solely on his own motion, and for the sole purpose of providing an alleged legal basis for entering an order in another suit (the *Brake Shoe* suit) over which he had no jurisdiction, entered an order consolidating the *Johnson* suit and the *Brake Shoe* suit into one suit under the title of "In the Matter of the Interborough-Manhattan Receivership Proceedings," and having made and filed said order of consolidation, he then entered an order in the said consolidated proceeding vacating all of the orders made by Judge Manton in the *Brake Shoe* suit. Judge Woolsey stated as his reason for consolidating the two cases (R. 710, fol. 2130):

> "There is in my mind a residuum of doubt whether, so long as they remain separate causes, an order could properly be made in the *Johnson* case, Equity No. 71-153, which would affect the receivership orders and the other orders made in the *American Brake Shoe & Foundry Company* case, Equity No. 70-364."

The Circuit Court of Appeals held that the order of consolidation was erroneous and reversed the same (R. 1034).

Neither Johnson nor Boehm in their petitions for a writ of certiorari raise any question as to the propriety of the decision of the Circuit Court of Appeals on this point. Accordingly, with the Order of Consolidation admittedly erroneous and out of the way, petitioner Johnson has no status whatsoever in the *Brake Shoe* suit, but only as a plaintiff in his own suit, and the petitioner Boehm has no status except as an intervenor therein.

As stated by the Circuit Court of Appeals in its opinion, the sole question presented to Judge Woolsey and presented to the Circuit Court of Appeals was the "limited issue whether the rules, assuming that they are valid, go to the jurisdiction of the judge" (R. 1029). Judge Woolsey held that the two rules absolutely deprived Judge Manton of the jurisdiction he otherwise would have had by virtue of his designation to hold a District Court. The Circuit Court of Appeals held that the rules, at most, were merely directory and that the failure to observe the same did not and could not deprive Judge Manton of jurisdiction.

On account of the vast interests involved, both public and private, and of the critical conditions requiring prompt action for the protection of said interests, appeals from said orders, and from an earlier order granting the petitioner herein leave to file his bill (R. 7), were promptly perfected and brought on for hearing before the Circuit Court of Appeals on November 14, 1932. On December 7, 1932, that Court handed down its opinion reversing all three orders appealed from and formal orders were entered on December 14, 1932 (R. 1036). Due to the delays arising from petitioner's motion to amend the opinion of the Circuit Court of Appeals so as to free him from costs, the final order for mandate was entered on December 29, 1932 (R. 1047).

However, despite the emergency conditions and the great and complicated interests involved, which the petitioner himself sets forth in his bill of complaint (R. 22, 23, 26-30, 34-39), his petition for certiorari was not filed in this Court until February 17, 1933, or served on respondents until February 20, 1933.

It is obvious, of course, that in a receivership of a great property the situation does not remain static. Many things have necessarily occurred in the administration of the receivership (involving the expenditure of millions of dollars) since Judge Woolsey's order of October 18, 1932, which have materially altered the situation, and make impossible the restoration of the *status quo* of August 26, 1932, and which, we believe, should be called to the attention of the Court,

although—while of record in the *Brake Shoe* suit—they are not in the record before the Supreme Court on this petition. We mention some of the more important in a note at the end of this brief (p. 19, *infra*).

There is no foundation in the record for the statement contained on page 3 of the Petition that "a simple contract creditor, with the consent of Interborough and Manhattan, two railroad corporations, obtained the appointment of friendly receivers for both corporations, in spite of the warning of this Court against such practices" in *Harkin* v. *Brundage*, 276 U. S. 36, and *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334.

There is absolutely nothing in the record to sustain, or, indeed, any basis of fact to justify, in any aspect thereof, the statement found on page 3 of the Petition that "The New York Bar, and the Judges of the District Court, cannot understand the repeated flouting of the effective rules governing equity receiverships in this district."

Summary of Argument.

1. It was not necessary for the Circuit Court of Appeals to make any determination as to the validity or effect of the Division of Business Order in order to sustain the validity of the orders appointing receivers made by Judge Manton [Answering Petitioner Johnson's Point 1 (a)].

2. The finding in the Order of Designation that the public interest required the designation is conclusive upon the Court and litigants [Answering Petitioner Johnson's Point I (b) and (c) and Boehm's Point II].

3. Rules 1-a and 11-a were at most directory and the failure to observe the same did not deprive Judge Manton of jurisdiction [Answering Petitioner Johnson's Point II].

4. The petitioner could have made all of his objections to the receivership on the return day (September 22, 1932) of the order to show cause respecting the appointment of temporary Receivers without intervention in the Brake Shoe

suit and without the necessity of filing an independent suit such as the Johnson suit [Answering Petitioner Johnson's Point III].

5. None of the matters presented in Point IV (Petitioner's Brief, p. 21) were considered before Judge Woolsey or passed upon by him or considered or passed upon by the Circuit Court of Appeals, and they are not involved in this petition [Answering Petitioner Johnson's Point IV].

POINT ONE.

[Answering Petitioner Johnson's Point I, Subdivision (a).]

It was not necessary for the Circuit Court of Appeals to make any determination as to the validity or effect of the Division of Business Order in order to sustain Judge Manton's power to appoint Receivers in the *Brake Shoe* suit.

The Circuit Court of Appeals, in reaching the decision sought to be reviewed, did not even advert to the Division of Business Order, and no weight was given to it on behalf of the respondents-appellants in their argument and briefs before the Circuit Court of Appeals.

If we assume, for argument's sake, that the Division of Business Order was absolutely void, such invalidity in no way affected the force and effect of the Designation Orders, and under those orders, we submit, Judge Manton had ample power to appoint receivers. Obviously, the mere fact adverted to in petitioner's brief that somebody bound the Designation Order and the Division of Business Order together for filing purposes, has no bearing on the situation. Neither order in any way was dependent upon or referred to the other.

POINT TWO.

[Answering Petitioner Johnson's Point I, Subdivisions (b) and (c) and Boehm's Point II.]

The finding in the Order of Designation that public interest required the designation is conclusive upon the Court and litigants.

(a) Judge Woolsey expressly refused to examine into the propriety of the Designation Order (R. 698) and the Circuit Court of Appeals held that it would not examine into the facts affecting the question of public interest (R. 1032).

The motion of Boehm expressly requested a determination by Judge Woolsey that the Designation Order and the Division of Business Order be vacated and set aside (R. 134). Judge Woolsey's order denied this motion "for want of jurisdiction" (R. 728, 729). No appeal was taken by the petitioners from this order of denial and the time to appeal has expired, and, accordingly, we submit that the propriety of the Order of Designation is not before the Court.

(b) Obviously, if the validity of the designation made by the Chief Justice of the United States or by a Circuit Justice or by the Senior Circuit Judge pursuant to the authority of Section 22, Title 28, of the United States Code could be questioned by litigants, either directly or collaterally, on the ground that the public interest did not, in fact, require the designation, chaos would result in the administration of justice in the Federal Courts. Litigants would go before such a designated Judge at the peril that at any time the whole proceeding might be held to be entirely void, either in the suit itself or in some concurrent or subsequent collateral suit, on the ground that the Judge had been entirely without jurisdiction, either because of lack of public interest at the time he was designated, or because the public interest originally justifying the designation had ceased to exist at the time of the actual proceeding before him.

Even assuming, for argument's sake, that the question as to whether, in fact, public interest justified his designation might be raised by a litigant involved in a proceeding being heard before a designated Judge, the question certainly cannot be determined and the whole proceeding before the designated Judge set at naught upon a mere *ex parte* assertion that no such public interest existed, made in a collateral suit. It is solely on the basis of such *ex parte* assertions made in the *Johnson* suit that this Court is asked to determine that there was no public interest sustaining the Designation Order.

On the merits on the right to question public interest, we need add nothing to what was said by Judge Learned Hand for the Circuit Court of Appeals (R. 1032), as follows:

> "The vacating decree at bar properly refused to consider the validity of the order of designation of August twenty-fifth, but the appellees attack it here. They say that it appears both from the affidavit of Quackenbush, and from an opinion of the Circuit Judge in the American Brake Shoe Company suit, rendered after the vacating decree, that the only public interest supporting it was the fear that a trust company might be appointed receiver; and that this is not the kind of interest contemplated by the statute. Even so, the order conferred the statutory authority upon the designated judge. The power to designate, granted by 28 U. S. C. A. Sec. 22, is plainly administrative, and parties are not subject to the peril that everything decided may be upset, unless they can satisfy another court that there was adequate occasion for its exercise. The situation is the same as in People ex rel. Saranac Land & Timber Co. v. Extraordinary Special & Trial Term of Supreme Court, 220 N. Y. 487, 116 N. E. 384, for it does not matter that the condition is the 'public interest,' rather than the appointing judge's 'judgment' of that interest. Section 22 was indeed originally the same as sections 17, 20 and 21 in this regard (28 U. S. C. A. secs. 17, 20, 21), but the section was recast generally in 1922 (42 Stat. 639 [28 U. S. C. A. sec. 22]), and the failure to retain the original phrase was certainly not intended to have such far-reaching consequences. It cannot be that the act of the

> Chief Justice, for example, or of a Circuit Justice, is to be subjected to a scrutiny when designating a Circuit Judge, to which it is not open in the case of a District Judge. The power can indeed be abused, but the remedy may be worse than the evil; it is not to the courts that the public must look for correction."
>
> See *United States* v. *Gill*, 292 Fed. 136 (C. C. A. 4th, 1923).

Point II made by Boehm in her brief has, we submit, no merit. The public interest involved warranting a designation by the Chief Justice or a Circuit Justice or the Senior Circuit Judge may obviously attach to a particular case. The making of designations for the trial of a particular case or a class of cases has been a uniform practice (R. 554, 555, 655, 659, 660, 661, 662). The right to do so was approved in *United States* v. *Gill*, 292 Fed. 136 (C. C. A. 4th, 1923).

POINT THREE.

[Answering Petitioner Johnson's Point II.]

Rules 1-a and 11-a were at most directory and the failure to observe the same did not deprive Judge Manton of jurisdiction.

So-called Rules 1-a and 11-a were ineffective to deprive a designated Judge of jurisdiction and to render his acts *coram non judice.*

The petitioner Johnson has now apparently abandoned Rule 1-a, which provided in effect that a designated Judge could do "such work only" as the Senior District Judge permitted. Boehm, in her brief, gives no real support to Rule 1-a.

Rule 11-a merely directs where applications for the appointment of receivers shall be made, i. e., "to the judge assigned to hold the Bankruptcy and Motion Part of the business of the court and to no other judge," i. e., whether he be a designated Judge or a District Judge.

The petitioner claims that the rule was made under the authority of a specific statute, to wit, Section 23 of the Judicial Code (Sec. 27, Title 28 of the United States Code) (Petitioner's Brief, p. 19). This section provides that, "In districts having more than one district judge, the judges may agree upon the division of business and the assignment of cases for trial in said district: * * *."

Obviously, this statute has no bearing whatsoever on Rule 11-a. A rule which requires a litigant to make his application for a receiver to the Judge sitting in the Motion Part, has no relation whatsoever to the division of business between the individual Judges. An agreement as to the division of business among the Judges is an arrangement by which they determine from day to day, or week to week, as to what individual Judge shall actually sit on a particular day in the Motion Part, as well as in the other parts of the Court. Obviously, notwithstanding Rule 11-a, disagreements might frequently arise as to who was actually to sit in the Motion Part.

If Rules 1-a or 11-a be more than directory, they are obviously invalid.

Section 731, Title 28 of the United States Code is the sole source of power of the District Court to make rules. It provides as follows:

> "Sec. 731. Rules of practice in district courts. The district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under section 730 of this title, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

Rules 1-a and 11-a are invalid because, contrary to the provisions of this statute, (a) they are inconsistent with

many laws of the United States, (b) they are inconsistent with rules prescribed by the Supreme Court, (c) they are not necessary or convenient for the advancement of justice and the prevention of delays in proceedings, but will have the contrary result, and (d) they are not rules of *practice*, but alleged rules of jurisdiction.

(a) Rules 1-a and 11-a are inconsistent with Section 13, Title 28 of the United States Code (Sec. 9 of the Judicial Code), which provides that District Courts as courts of equity "shall be deemed always open," and "*any district judge* may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court." (Italics ours.)

Furthermore, under Section 22 of Title 28 of the United States Code (Sec. 18 of the Judicial Code), a Circuit Judge designated to hold a District Court by the Chief Justice of the United States, the Circuit Justice of any circuit, or the Senior Circuit Judge thereof, "shall have all the powers and rights and perform all the duties of a judge of the district," excepting only "the power of appointment to a statutory position or of permanent designation of a newspaper or depository of funds," and by Section 23 of said title (Sec. 19 of the Judicial Code) it is made his duty to discharge all the judicial duties for which he is so appointed; and "all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district."

With respect to the powers of a Judge so assigned, this Court said, in *Ex parte United States* (226 U. S. 420, 423):

> "It is moreover beyond question that the statutes while contemplating as a general rule the holding of District Courts by district judges and as a general rule for holding Circuit Courts of Appeal by circuit judges, nevertheless expressly directs when the occa-

> sion requires (Sec. 18) the assignment by the senior judge, or the circuit justice, or the Chief Justice of a circuit judge to hold a District Court and endows a judge so assigned with all the authority of a district judge (Sec. 19), giving power in case of such designation to hold separately at the same time a District Court in such district, and to discharge all the judicial duties of the district judge therein (Sec. 14). The statute therefore clearly gives to the circuit judges the rights and powers of judges of the new District Courts, and calls such powers into play when assigned according to law." (References in above quotation are to sections of Judicial Code.)

There are numerous other laws of the United States with which Rules 1-a and 11-a are also inconsistent, as, e. g., Sections 17, 18 and 23, Title 28, United States Code.

(b) Rules 1-a and 11-a are inconsistent with Rule 6 of the Federal Equity Rules, which provides that

> "The judge may *at any time and place*, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings, advancement, conduct and hearing of causes." (Italics ours.)

Furthermore, Rule 11-a in terms purports to regulate the practice "in equity causes," but it did not receive the concurrence of a majority of the Circuit Judges (R. 713, fol. 2139), as Federal Equity Rule 79 requires.

The Circuit Court of Appeals did not find it necessary to pass on the validity of said so-called Rules 1-a and 11-a, because it held that in any case they did not have the effect of depriving a designated Judge of the jurisdiction vested in him by the statute and that any question as to the violation of said rules could not be raised in the manner the petitioner has attempted to raise it.

We deem it unnecessary to add to the cogent reasons of Judge Learned Hand in support of that view (R. 1028 *et seq.*).

POINT FOUR.

[Answering Petitioner Johnson's Point III.]

The petitioner could have made all of his objections to the receivership on the return day (September 22, 1932) of the order to show cause respecting the appointment of temporary Receivers without intervention in the *Brake Shoe* suit and without the necessity of filing an independent suit such as the *Johnson* suit.

The Circuit Court of Appeals did not hold "that petitioner could attack Judge Manton's orders only by intervention in the *Brake Shoe* case," as is stated in Johnson's brief (p. 20). It held that the petitioner could not collaterally attack said orders.

It held that on the return of the rule *nisi* in the order appointing temporary Receivers, the petitioner could have appeared, as he was expressly invited by the order to do, and could have asked that the cause be transferred to another Judge and that other Receivers be appointed, and that his appeal from the denial of his request would have been entertained by the Circuit Court of Appeals (R. 1033).

Equity Rule 37 does not purport to prevent, and did not in fact prevent, the petitioner as a creditor from appearing on September 22, 1932, the return day of the temporary order, either specially or generally, and challenging the jurisdiction or opposing the continuance of the receivership.

The temporary order appointing Receivers provided—

> "upon the hearing thereon any other creditor of the defendant or any other party in interest may be heard" (Vol. II, p. 62).

Under the practice followed by the Circuit Court of Appeals for the Second Circuit, the petitioner could have filed a special appearance, without intervention, for the purpose of moving to vacate the receivership on all the grounds set

forth in the bill of complaint and motions in the *Johnson* suit and could have appealed to the Circuit Court of Appeals from a denial of his motion and been heard on the merits.

Kingsport Press, Inc. v. *Brief English Systems*, 54 Fed. (2d) 497.

Christian v. *Hoe, Inc.*, decided by Circuit Court of Appeals, 2nd Circuit, Feb. 20, 1933, not yet reported.

Mitchell v. *Lay*, 48 Fed. (2d) 79, 84, 85 (C. C. A. 9th).

Pacific Northwest Packing Co. v. *Allen*, 109 Fed. 515 (C. C. A. 9th).

The statement at the bottom of page 16 of Boehm's brief, that "The complainants (meaning Johnson and Boehm) * * * had no notice of the application"—i. e., the order of August 26, 1932, appointing Interborough Receivers, is, obviously, untrue, for the Johnson complaint which was filed on September 21, 1932, sets forth all the facts about the appointment of Interborough Receivers (R. 14). Boehm, counsel for Lillian Boehm, was also of counsel on the Johnson complaint (R. 48). In fact, both Mr. Louis Boehm, counsel, and Mr. Charles Franklin appeared before Judge Manton on behalf of their clients on September 6, 1932 (R. 566).

POINT FIVE.

[Answering Petitioner Johnson's Point IV.]

None of the matters presented in Point IV (Petitioner's Brief, p. 21) were considered before Judge Woolsey or passed upon by him or considered or passed upon by the Circuit Court of Appeals, and they are not involved in this petition.

The petitioner did not, either in his bill of complaint, his petition for the vacation of Judge Manton's orders or in argument before Judge Woolsey, attack the orders appointing temporary Receivers as being "consent decrees" "based upon a bill of a simple contract creditor."

The bill will be found at page 13 of the record, the petition at page 118, and the minutes of the hearing before Judge Woolsey, which the petitioner insisted on having incorporated in the record, at page 823.

The petitioner in his bill asked for the appointment of different receivers and set forth at length the reasons why such appointment was imperative (R. 35 *et seq.*).

The charge that the proceeding for the appointment of a receiver of the Interborough was a "collusive one" to obtain friendly receivers (Petitioner's Brief, p. 22)—which charge was based on *ex parte* allegations founded on inferences contained in the *Johnson* bill of complaint (R. 70, 72, 74, 75, 24, 25, 26)—was not argued before Judge Woolsey (R. 848, fol. 2543; p. 931, fol. 2793) and was not considered by the Circuit Court of Appeals and is not before this Court.

IN CONCLUSION.

The writ of certiorari should be denied.

Respectfully submitted,

NATHAN L. MILLER,
Counsel for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of the Interborough Rapid Transit Company.

NATHAN L. MILLER,
WILLIAM W. MILLER,
CHARLES A. BOSTON,
CARL M. OWEN,
of Counsel.

The undersigned join in the foregoing brief and submit that the ~~return~~ writ of certiorari should be denied.

CHARLES E. HUGHES, JR.,
ALLEN S. HUBBARD,
Counsel for William Roberts, as Receiver of Manhattan Railway Company.

On behalf of the respondent Committee for the protection of the holders of Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of Interborough Rapid Transit Company, the undersigned concurs in the arguments advanced in the foregoing brief and submits that the petition for a writ of certiorari should be denied.

CLOYD LAPORTE,
Counsel for Charles Hayden and others, as Committee for the protection of the holders of Ten-Year Six Per Cent. Gold Notes of Interborough Rapid Transit Company.

The undersigned joins in the foregoing brief and, in addition, urges that the damage and injury which would result to the Bondholders represented by the Protective Committee named below and to the other creditors of Manhattan Railway Company require that the petition be denied.

PAXTON BLAIR,
Counsel for Van Santvoord, Merle-Smith and others, as the Protective Committee for Manhattan Railway Company Consolidated Mortgage Four Per Cent. Gold Bonds, Intervenors in the suit of The American Brake Shoe and Foundry Company v. Interborough Rapid Transit Company, now pending in the District Court of the United States for the Southern District of New York.

BOYKIN C. WRIGHT,
of Counsel.

Note.

One of the most urgent matters which the complainant Johnson set forth in his bill as requiring immediate action was the payment by the Interborough of the interest on the $40,683,000 in principal amount of Consolidated Bonds of the Manhattan Railway Company as an item of rent under the Manhattan lease which would be due on October 1, 1932 (R. 36). An application of the Interborough Receivers for instructions with respect to the payment of this rent (R. 329) and a petition of the Manhattan Receiver requesting an order that this be paid (R. 366) were referred to Basil O'Connor as Special Master by an order of Judge Manton made November 7, 1932.

At the hearings before the Special Master, *Mr. Charles Franklin,* attorney herein for Johnson suing as a stockholder in the derivative right of the Manhattan Railway Company, appeared as attorney for the Manhattan Railway Company itself, which, as above stated, had intervened in the *Brake Shoe* suit on September 6, 1932.

In this connection it is to be noted that the *Johnson* bill was filed on September 21, 1932, and that a substantial portion of the bill is devoted to alleged claims of the Manhattan against the Interborough and to reasons as to why other receivers of Manhattan should be appointed (R. 25 *et seq.*). On September 24, 1932, a committee of stockholders of the Manhattan Railway Company, of which Nathan L. Amster is chairman and *Charles Franklin*, attorney for the petitioner Johnson, is a member, and for which Charles Franklin also acted as attorney, filed a petition of intervention in the *Johnson* suit (R. 144, 146), and an order granting said intervention was entered on September 26, 1932 (R. 142). At the annual stockholders' meeting of the Manhattan Railway Company held on November 11, 1932, Mr. Nathan L. Amster was elected President and Mr. Franklin was chosen as General Counsel, since which date Mr. Franklin has appeared at all of the proceedings in the Interborough Receivership in the *Brake Shoe* suit on behalf of the Manhattan Railway Company, and he was formally substituted as solicitor therefor on January 21, 1933. On December 7, 1932, Mr. Franklin, as attorney for the Manhattan Railway Company, made a motion in the *Brake Shoe* suit for the appointment of Mr. Amster as Receiver of the Manhattan Railway Company in place of Mr. Roberts, and the questions raised by this motion have been referred to the Special Master. We believe it is a fair inference from the record that the *Johnson* suit was brought only in the name of Johnson as a citizen of Kentucky in order to confer jurisdiction on the Federal Court, that the real plaintiff was Nathan L. Amster, and that Nathan L. Amster having become the President of the Manhattan Railway Company, and a Board of Directors thereof largely chosen by him having been put into office, the ostensible reason for a derivative suit has disappeared.

On November 30, 1932, Judge Manton ordered the payment by the Interborough Receivers of the interest then past due on the Consolidated Mortgage Bonds of the Manhattan Railway Company, involving an outlay on the part of the Receivers of approximately $817,000.

On November 17, 1932, the Chase National Bank of New York, as Trustee of the Second Mortgage of the Manhattan Railway Company, intervened and filed a bill to protect its rights as Trustee of the mortgage securing said bonds; requesting an impounding of income.

On December 20, 1932, an order was entered directing that all claims and demands against the Interborough Rapid Transit Company should be presented to the Receivers within three months from the date thereof, and providing that all claims and demands not presented within said period of three months should be barred from sharing in the benefits of the distribution of the proceeds of the properties of the Interborough Rapid Transit Company, pursuant to which order advertisement of the terms thereof has been made in newspapers specified in said order and many claims have been presented and approved pursuant thereto.

On December 21, 1932, Judge Manton ordered the payment by the Interborough Receivers of the interest due December 1, 1932, on the Second Mortgage Bonds of the Manhattan Railway Company.

On December 21, 1932, the Interborough Receivers were ordered to pay certain taxes on the property of the Interborough Rapid Transit Company, amounting to approximately $557,000, some of which have been past due since 1928.

On December 21, 1932, the Interborough Receivers were directed to pay the interest and sinking fund due and payable on January 1, 1933, on all of the outstanding First and Refunding 5% Gold Bonds of the Interborough Rapid Transit Company, which involved a cash outlay of approximately $6,282,000. This outlay has subsequently been made by the Receivers pursuant to this order and in addition transfers of securities to meet the terms of the sinking fund have been made pursuant to the authority of said order.

On December 24, 1932, Arthur W. Loasby and others, as a Committee for the Stock and Voting Trust Certificates for Stock of the Interborough Rapid Transit Company, intervened.

On December 29, 1932, Judge Manton ordered the payment by the Interborough Receivers of past due taxes on the property of the Manhattan Railway Company amounting to approximately $817,000, and said taxes have subsequently been paid.

In addition, the Receivers have modified a number of contracts of the Interborough and have disaffirmed others; among others, they have obtained a substantial modification of the contract affecting wages.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. VII and No. VIII.

BENJAMIN F. JOHNSON,
Petitioner,
against
MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
OF THE
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., RECEIVERS OF INTERBOROUGH RAPID TRANSIT COMPANY, RESPONDENTS.

ALSO ON BEHALF OF RESPONDENT COMMITTEE FOR THE PROTECTION OF THE HOLDERS OF TEN-YEAR SIX PER CENT. GOLD NOTES DUE OCTOBER 1, 1932, OF INTERBOROUGH RAPID TRANSIT COMPANY.

NATHAN L. MILLER,
Counsel for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, Respondents.

NATHAN L. MILLER,
WILLIAM W. HELLER,
CARL M. OWEN,
HAROLD J. GALLAGHER,
of Counsel.

CLOYD LAPORTE,
Counsel for Respondent Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 711 AND No. 721.

BENJAMIN F. JOHNSON,
Petitioner,

against

MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER

OF THE

INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

BRIEF ON BEHALF OF VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., RECEIVERS OF INTERBOROUGH RAPID TRANSIT COMPANY, RESPONDENTS.

ALSO ON BEHALF OF RESPONDENT COMMITTEE FOR THE PROTECTION OF THE HOLDERS OF TEN-YEAR SIX PER CENT. GOLD NOTES DUE OCTOBER 1, 1932, OF INTERBOROUGH RAPID TRANSIT COMPANY.

This Court has separately allowed applications of the petitioner Johnson, the plaintiff in the suit of *Benjamin F. John-*

son v. *Manhattan Railway Company, and others,* and of the petitioner Boehm, intervenor in that suit, for certiorari to the Circuit Court of Appeals for the Second Circuit to review the decision of that Court (R. 775) reversing the order of Judge Woolsey made on October 18, 1932, which vacated as *coram non judice* an interlocutory order of Judge Manton, as a Circuit Judge designated to hold a District Court for the Southern District of New York, appointing temporary receivers of the Interborough Rapid Transit Company in the suit of the *American Brake Shoe and Foundry Company* v. *Interborough Rapid Transit Company,* and a score or more of other interlocutory orders made in the course of the administration of said receivership (R. 725-729)—the "Vacating Order."

The Circuit Court of Appeals also reversed an order of the District Court made on September 20, 1932, in the *Johnson* suit granting the complainant leave to file his bill against the Interborough Rapid Transit Company and the Manhattan Railway Company and their Receivers, and an order made by Judge Woolsey on the Court's own motion on October 18, 1932, consolidating the *Johnson* suit and the *American Brake Shoe* suit under the third title above (R. 775, 722).

In the petitions for certiorari, petitioners complained solely of the reversal of Judge Woolsey's "Vacating Order" of October 18, 1932.

The motions of both the plaintiff Johnson and the intervenor Boehm before Judge Woolsey prayed for an order vacating and setting aside the order of Judge Manton, dated August 25, 1932, designating himself to hold a District Court, and also the order of Judge Manton, dated August 25, 1932, designating himself to hear an application for the appointment of Receivers (the Division of Business Order) (R. 115, fols. 344, 345, and R. 131, fols. 392, 393). Judge Woolsey denied the motions of Johnson and Boehm in so far as they sought to vacate the Designation Order and the Division of Business Order (R. 728-729). No appeal to the Circuit Court of Appeals was taken by Johnson or Boehm from this denial.

Petitioners have filed separate briefs. We shall answer both in one.

Statement of Facts.

The Interborough Rapid Transit Company is a New York corporation. On August 26, 1932, its capitalization consisted substantially of the following:

First and Refunding Mortgage 5% Gold Bonds (secured by a mortgage to the Guaranty Trust Company of New York) outstanding in the hands of the public (R. 159).....	$132,000,000.00
Ten-Year Secured Convertible 7% Gold Notes secured by a pledge to the Bankers Trust Company, Trustee, of approximately $54,000,000 in principal amount of the above-mentioned First and Refunding Bonds (R. 159).....	31,672,100.00
These Notes matured on September 1, 1932, and the Interborough was without funds with which to pay the same or to pay an instalment of interest due on that date of. (R. 165)	1,108,523.50
Unsecured Ten-Year Six Per Cent. Gold Notes (R. 159), due October 1, 1932.....	10,500,000.00
On which date there was also payable an instalment of interest in the amount of.. The Interborough was without funds to pay the principal and interest of these Notes (R. 165).	315,000.00
Floating indebtedness for materials, equipment, taxes and supplies of over..... (R. 164)	2,500,000.00
Common capital stock of the par value of.. (R. 158)	35,000,000.00

The principal asset of the Interborough consists of its lease of the subway properties in the City of New York, granted to it by the City of New York under a contract known as Contract No. 3. The Interborough is also the lessee and operator of all of the elevated railroad properties belonging to the Manhattan Railway Company under a lease dated

January 1, 1903. It also owned certain extensions of the elevated railways and had rights under a trackage contract (R. 157).

Manhattan Railway Company. On August 26, 1932, the capitalization of the Manhattan Railway Company consisted of:

Consolidated Mortgage 4% Bonds (First Mortgage Bonds) in the principal amount of (R. 160) ..... interest on which is payable on the 1st days of April and October in each year.	$40,683,000.00
Four Per Cent. Second Mortgage Bonds in the principal amount of (R. 160) ..... the interest on which is payable on the 1st days of June and December in each year.	4,523,000.00
Common Stock of the par value of (R. 159) ..	60,000,000.00

All of the railway property of the Manhattan Railway Company is leased to the Interborough by the aforesaid lease, pursuant to which as rental the Interborough was obligated to pay, among other things, all of the taxes on the property of the Manhattan or its franchises, the interest due on the above-mentioned Consolidated Bonds and Second Mortgage Bonds, and certain dividends on the Manhattan stock (R. 159, 160).

The result is that on August 26, 1932, the Manhattan Railway Company, as a company, was not in possession of any assets whatsoever except a small amount of cash on hand. Its property was then and still is in the hands of the Interborough as lessee thereof (R. 254-255). As Boehm in her brief states (p. 3): "Under this lease arrangement, Manhattan became a mere corporate shell and has so continued since 1903."

I.

Brake Shoe Suit.

On August 26, 1932, The American Brake Shoe and Foundry Company filed its bill of complaint herein, in which it

asked for the appointment of a receiver of the Interborough Rapi' Transit Company (R. 153). The Interborough Rapid Transit Company thereupon on the same date filed its answer pursuant to the authority of its Board of Directors (fols. 519-521), admitting all the allegations of the bill of complaint and consenting to the appointment of a receiver or receivers (fols. 511-518).

The bill of complaint showed that the plaintiff was a Delaware corporation, that the defendant Interborough was a New York corporation (R. 154, fol. 460), and that the defendant owed the plaintiff $27,530.89, payment of which had been duly demanded but refused. The suit was stated to be on behalf of complainant and all others who might join (R. 153). The complaint and the answer disclosed that the Interborough was in default in a substantial manner under its obligations under its aforesaid First and Refunding Mortgage securing bonds outstanding in the hands of the public in the principal amount of more than $132,000,000, and securing additional bonds in excess of $54,000,000 pledged as security for its Collateral Notes; that it was in default to a substantial degree under the terms of its lease of the elevated railroad of the Manhattan Railway Company; that it was badly in arrears in payment of taxes on its own property; that it had due and owing (or would have due and owing within a few days from the date of the appointment of the Receivers) indebtedness, *which it was absolutely unable to pay,* for supply bills, rent under the Manhattan lease, principal and interest of funded indebtedness and past due taxes in an amount in excess of $48,000,000 (R. 164, 165). The complaint contained the usual prayer for an administration of assets, an injunction and receivers (R. 168, 169).

Thereupon, on August 26, 1932, Judge Manton, holding a District Court for the Southern District of New York pursuant to designation, signed an order appointing Victor J. Dowling and Thomas E. Murray, Jr., temporary Receivers of the Interborough (R. 180). The said order further directed—

> "that the parties hereto show cause before the undersigned * * * on the 22nd day of September, 1932,

> * * * why the said receivership should not be continued during the pendency of this suit and upon the hearing thereon any other creditor of the defendant or other party in interest may be heard" (R. 184, fol. 551).

On September 6, 1932, the Manhattan Railway Company (following the procedure adopted in *Re Metropolitan Street Railway Receivership*, 208 U. S. 90) filed its petition for leave to intervene and asked that the receivership be extended to embrace the properties of the Manhattan Railway Company (R. 248-255). Thereupon, on the same date, Judge Manton appointed William Roberts as temporary Receiver of the Manhattan Railway Company (R. 196-200). The order of appointment contained the same provision as was found in the order appointing temporary Receivers of the Interborough, to wit, that the parties should show cause on September 22, 1932, as to why the receivership should not be made permanent and

> "upon the hearing thereon any other creditor of the defendant or other party in interest may be heard" (R. 199, 200).

Committees representing the Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds (R. 189), the Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes due September 1, 1932 (R. 191), the Interborough Rapid Transit Company Ten-Year 6% Gold Notes due October 1, 1932 (R. 193), the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds (R. 201), the Seven Per Cent. Guaranteed Stock of the Manhattan Railway Company (R. 221), the Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of the Manhattan Railway Company (R. 214), the Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company (R. 226) and others have petitioned for and been granted intervention in the *Brake Shoe* suit, or on order been made parties (R. 2, 3), and all are supporting the receivership.

On September 22, 1932, no one opposing, Judge Manton determined to make the appointments of Dowling and Murray as Interborough Receivers and the appointment of Roberts as Manhattan Receiver permanent and formal orders to that effect were accordingly entered on September 28, 1932 (R. 223).

Between September 28, 1932, and October 18, 1932, many administrative orders of one kind or another were made by Judge Manton in the *Brake Shoe* suit (R. 226-231).

There was in force, at all times since it was made, a standing designation of Judge Manton to hold a District Court made on March 20, 1930 (R. 708, fol. 2122; R. 661). On August 25, 1932, as Senior Circuit Judge, he made another designation of himself to hold a District Court for the Southern District of New York "during the period beginning August 25, 1932," and particularly to hear and determine all applications and proceedings in the matter entitled "American Brake Shoe and Foundry Company vs. Interborough Rapid Transit Company" (R. 177).

Petitioner Johnson says that his bill and supplemental bill show that the *Brake Shoe* suit was collusive (Johnson brief, p. 2). There is no such averment. The most that can truthfully be said is that evidence was pleaded from which the petitioners now ask the Court to draw that inference.

Petitioner Boehm charges in her brief that the purpose of the receivership was to enable the Interborough to rid itself of the Manhattan lease and to bring about a foreclosure of the Manhattan first mortgage and a purchase of the property for a nominal sum, and she even suggests that a receivership could have been avoided (Boehm brief, pp. 8, 9). That is only one of the many reckless and unwarranted statements scattered through the petitioners' briefs, which are wholly irrelevant to any question now before the Court and which it would unduly prolong this brief to answer in detail.

The fact is that both petitioners allege in their respective bills that the appointment of receivers of the Interborough was imperative (R. 36, 96), and the truth is that the necessary purpose and effect of an equity receivership is to secure equitable treatment of all interests and to protect them from

the very consequences which said petitioner Boehm charges are the objects of the suit, and she herself has to admit that as far as the Manhattan interests are concerned Judge Manton is affording such protection (Boehm brief, p. 12).

The suggestion that Interborough obligations of $48,000,000 maturing shortly after the appointment of receivers could have been refunded or refinanced in September, 1932, like many of petitioners' statements, is not to be taken seriously.

Petitioner Boehm's statements regarding the relations between the Manhattan and the Interborough Companies (Boehm brief, pp. 2-12) show that difficult and important questions for adjudication are involved. See *Johnson* Supplemental Complaint (R. 54). Said petitioner grudgingly refers (*Id.*, p. 12) to the protection to the Manhattan interests already afforded by the Court "upon the application of the Mortgage Trustee," which, it may be observed in passing, has intervened in the *Brake Shoe* suit and is supporting the receivership. With equal frankness she might also have acknowledged that the rights and interests of the Manhattan Company are being ably and vigorously asserted and defended by its receiver and his counsel.

The petitioners seek the appointment of receivers of both Companies in their representative action on behalf of the Manhattan Company, despite the fact that a receiver of that Company has already been appointed on its own petition and after its voluntary intervention in the *Brake Shoe* suit.

On their own showing the petitioners are seeking the appointment of receivers to represent conflicting interests in a suit which they can control, and their assertion of interests transcending the issues between the parties to the suit (Boehm brief, p. 14) must be weighed in the light of the fact that the *Johnson* suit was only brought after Judge Manton had refused to make the palpably unnecessary appointment of additional receivers of the Manhattan nominated by the petitioners' counsel (R. 567, 569).

The petitioners allege in their bills and emphasize in their briefs the fact that the Manhattan and Interborough Companies have common directors. They omit to inform the

Court, however, that the Manhattan directors on the Interborough board are there perforce of contract rights of the Manhattan Company to have representation on the Interborough board (R. 670).

II.

The Johnson Suit.

The *Johnson* suit was, it appears, an outgrowth of the *Barber* suit. On August 29, 1932, one Harry Barber, a stockholder of Manhattan Railway Company, obtained an order from Judge Manton, holding a District Court pursuant to designation, permitting Barber to file a complaint in which the Interborough and its Receivers were made parties defendant (R. 565, fol. 1694; R. 652), and, pursuant to this leave, on August 29, 1932, the bill of complaint was filed with the United States District Court for the Southern District of New York, entitled "Harry Barber, complainant, against Manhattan Railway Company, Interborough Rapid Transit Company, Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of Interborough Rapid Transit Company, and others," wherein the complainant as a mere stockholder of the Manhattan, after setting forth the provisions of the Manhattan lease, prayed that an account be taken as between the Interborough and the Manhattan under the Manhattan lease, and that a Receiver be appointed for the Manhattan Railway Company (R. 564, fol. 1692; R. 613).

On September 6, 1932, a hearing was had before Judge Manton on an order to show cause obtained in the *Barber* suit as to why receivers of Manhattan should not be appointed, and there appeared, among others, Charles Franklin, who stated that he was counsel for a Committee called "Manhattan Common Stockholders' Protective Committee," composed of Nathan L. Amster and others, including Charles Franklin himself, and also on behalf of Brookin Corporation and Llewellyn Hernly, who had deposited stock with said Committee (R. 566, fol. 1696). Louis Boehm also appeared as an attorney, who stated that he was counsel for certain stockholders of Manhattan (R. 566, fol. 1696).

Said Franklin and Boehm stated that their clients were intervening in the *Barber* suit (R. 566, fol. 1697; R. 567, fol. 1700), and at that time a petition for intervention in the *Barber* suit on behalf of Franklin, said Manhattan Railway Company Common Stockholders' Committee and the Brookin Corporation was presented to Judge Manton.

Judge Manton informed counsel that on the application of the Manhattan Railway Company itself in the *Brake Shoe* suit he had appointed William Roberts to be Receiver of the Manhattan Railway Company (R. 566, fol. 1698). Thereupon Mr. Franklin urged Judge Manton to appoint Nathan L. Amster as *an additional* Receiver as being the relief which he particularly desired at the time (R. 567, fol. 1701). Mr. Boehm limited his request to the appointment of Mr. Malcolm Sumner as a co-receiver with Mr. Roberts (R. 569, fol. 1705). Judge Manton expressed the opinion that two receivers of the Manhattan were not needed at the time (R. 568). Obviously, Judge Manton was not authorized in the *Barber* suit, on such a mere stockholders' bill without answer, to appoint any receivers of the Manhattan.

The affidavit of Charles Franklin, attorney for Johnson (R. 683, fol. 2048), and the affidavit of Louis Boehm, also of counsel for Johnson (R. 688, fols. 2063, 2064), make it clear that the subsequent institution of the *Johnson* suit arose because of their disappointment over the failure of Judge Manton to appoint either Mr. Amster or Mr. Sumner as a co-receiver, with Roberts, of the Manhattan Railway Company, as suggested by them in the *Barber* suit.

Under the express invitation given by the terms of the order appointing temporary Receivers of the Interborough and the express invitation given by the terms of the order appointing Roberts temporary Receiver of Manhattan, Mr. Franklin, as representing the stockholders on whose behalf he had intervened in the *Barber* suit, and Mr. Boehm, as representing his wife, Lillian Boehm, could have appeared in the *Brake Shoe* suit on September 22, 1932, *without intervention therein* and have made all of the contentions with respect to the validity of the appointment of Receivers by Judge Manton which they have subsequently made. They

could have asked for the appointment of other receivers, or for the transfer of the cause to another Judge on the ground that Rules 1-a and 11-a (quoted in the footnote, p. 12) so required, and according to the settled practice in the Second Circuit, as stated by Judge Learned Hand (R. 1033), they could have appealed from an adverse decision. Instead, they decided to treat Judge Manton's orders as utter nullities, as mere blank paper, and to institute an independent suit.

On September 20, 1932, the *Johnson* suit was begun when United States District Judge Francis G. Caffey signed an order granting Benjamin F. Johnson leave to file his bill of complaint in which he made the Manhattan Railway Company, William Roberts as temporary Receiver thereof, Interborough Rapid Transit Company, Victor J. Dowling and Thomas E. Murray, Jr., as temporary Receivers thereof, the City of New York and The American Brake Shoe and Foundry Company, defendants (R. 7). This is one of the orders from which an appeal was taken to the Circuit Court of Appeals and which was reversed by that Court. *No specification of error with respect to such reversal is made by the petitioners in this Court.*

Johnson's bill of complaint alleges that he is a resident of Kentucky and is the owner of 100 shares of stock of the defendant Manhattan Railway Company (R. 13). The action is alleged to have been brought by the complainant in his derivative capacity as a minority stockholder of the Manhattan Railway Company in his own behalf and in behalf of other stockholders (R. 14, fol. 42). *It is primarily a suit for an accounting* between the Manhattan and the Interborough Companies. The complaint stresses the grave danger to the Manhattan security holders unless the receiverships of the Interborough and the Manhattan are continued (R. 36, 37) and that the situation *"requires"* the Court to continue the receiverships with new receivers.

The complaint alleges that the appointment of receivers in the *Brake Shoe* suit was irregular and void for the specific reason that that was in contravention of Rules

1-a and 11-a* of the District Court (R. 15, 16). It further alleges various rights of the Manhattan Railway Company under the lease of its property to the Interborough, and the grave danger to the Manhattan Railway Company of a possible foreclosure of its Consolidated Mortgage (R. 36, fol. 107), and prays that the Designation Order be vacated, that the Division of Business Order be vacated, that the appointment of temporary Receivers of the Interborough be vacated, that the appointment of a temporary Receiver of the Manhattan be vacated, and that the Court appoint "independent receivers" for the Interborough and "independent receivers" for Manhattan (R. 43, fol. 129), and that, among other things, an account be taken of the sums due and owing the Manhattan by the Interborough (R. 44, fol. 131). Mr. Louis Boehm was of counsel on the bill of complaint which was signed and verified (R. 571) by Mr. Charles Franklin (R. 48, fol. 144).

On September 21, 1932, Judge Caffey also made an order in the *Johnson* suit on the consent of Franklin, attorney for Johnson, permitting Lillian Boehm to intervene therein as a party plaintiff (R. 138, fol. 413). The petition of Boehm for leave to intervene asserted that she was the holder of stock of the Manhattan Railway Company and also the holder of First Mortgage Bonds of the Manhattan Railway Company (R. 139, fol. 417), and also the holder of First and Refunding Mortgage Bonds of the Interborough (R. 140, fol. 418).

Having been permitted to intervene in the *Johnson* suit as a stockholder of the Manhattan, Lillian Boehm, on September 21, 1932, filed a bill of complaint (R. 80) therein, in which she asserted that her rights were based on the ownership of First and Refunding Bonds and of Ten-Year Secured Convertible 7% Gold Notes of the *Interborough*. Her complaint makes no mention of ownership of either stock or obligations of Manhattan. It contained allegations that were evidently taken to a large degree from the

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* 1-a. Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as may be assigned to him by the senior district judge.

11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy Rules), shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the court and to no other judge.

bill of complaint in the *Brake Shoe* suit (so stated Boehm's brief, p. 13). It alleged that under the circumstances it was imperative that there be appointed a receiver of the Interborough (R. 96, fol. 287), and that the appointments of Dowling and Murray should be set aside and independent receivers under properly constituted authority be appointed (R. 97, fol. 290). The prayer of the bill was that the Designation Order and the Division of Business Order be vacated, that the appointments of Dowling and Murray, and all other proceedings before Judge Manton be vacated, and that the Court appoint "independent receivers" of the Interborough (R. 108, 109).

On September 24, 1932, a Committee of Stockholders of the Manhattan, of which Nathan L. Amster was chairman, Charles L. Franklin a member and also counsel, intervened in the *Johnson* suit (R. 142, 144).

On October 3, 1932, Johnson filed a supplemental bill of complaint (R. 49) in which he claimed that—

> "In addition to the interest of complainant who has instituted this suit in his derivative right as a stockholder of Manhattan * * * for the benefit and protection of Manhattan and all stockholders similarly situated, *including bondholders and all others financially interested* in said company, * * *" (R. 50, fol. 148);

although neither in the original bill of complaint nor in the supplemental bill of complaint did Johnson allege the ownership of any bonds or anything other than Manhattan stock.

No answers to the complaints in the *Johnson* suit had been filed by any of the defendants in the *Johnson* suit at the time of Judge Woolsey's decision.

Three orders to show cause as to why all of the orders of Judge Manton in the *Brake Shoe* suit should not be vacated having been obtained by Johnson and Lillian Boehm in the *Johnson* suit (R. 114-117, 123-125, 130-132), these various orders were argued before Judge Woolsey on October 6, 1932 (R. 812-996). The questions before this Court arise from these orders to show cause. The minutes of the

hearing before Judge Woolsey were filed in the District Court pursuant to Judge Woolsey's direction (R. 997) and were included in the Transcript of Record at the insistence of counsel for Johnson.

On October 13, 1932, Judge Woolsey filed his opinion (R. 694-721).

On October 18, 1932, two orders were entered pursuant to the said opinion. The first order was an order made by Judge Woolsey on his *own motion* and "against the objection and protest" of the parties to the *Brake Shoe* suit (R. 722, fol. 2166) consolidating the *Johnson* suit with the *Brake Shoe* suit under the title of "In the Matter of the Interborough-Manhattan Receivership Proceedings." This order having been made and filed (R. 994, 995), Judge Woolsey then made his second order, the order vacating the orders of Judge Manton (R. 725). In this Vacating Order, Judge Woolsey denied the motions in so far as they sought to have vacated the Designation Order and the Division of Business Order (R. 728, 729, fols. 2184-2185). *No appeal was taken by Johnson or Boehm from the order of Judge Woolsey denying their motion to vacate the Designation Order and the Division of Business Order.*

No specification of error is made by the petitioners in respect of the reversal of the Consolidation Order. Although claiming that Rules 1-a and 11-a are jurisdictional, both petitioners Johnson and Boehm defend them as merely "calendar" rules (Johnson brief, p. 11; Boehm brief, p. 44).

Brief of The City of New York.

Without having previously received a copy thereof, the parties hereto gave consent to The City of New York to file a brief as *amicus curiae*. The brief of the City as served is devoted to contentions which have no relationship whatsoever to the questions presented to this Court. If the brief of the City demonstrates anything pertinent, it is that public interest attached to the Interborough receivership proceeding. The City does not question the jurisdiction of Judge Manton (City's brief, p. 13).

The Controversy.

As was stated by Judge Learned Hand in the opinion of the Court below (R. 1028):

> "The controversy does not touch the substantial relief asked by any of the parties; all acknowledge that the two railways are in such financial straits that a court of equity must take over their assets, to prevent their dismemberment by execution, attachment and the like. The plaintiffs, and those who have intervened, ask for receivers just as do the parties to the American Brake Shoe Company suit. *The dispute touches merely who shall be the receivers and who the Judge to have charge of the receivership.*" (Italics ours.)

Petitioner Boehm, at page 30 of her brief, says:

> "Petitioners were not seeking a complete disruption of the receivership proceedings. Substantially they sought only a removal of the proceedings to the proper district judge and an appointment of different and independent receivers."

See similar statements at page 26 of Boehm's brief.

As to who shall be receivers of the Interborough, we believe that there never *in fact* has been any real controversy. The *Johnson* bill makes no charges against the Interborough Receivers, except the inconsequential claim that Judge Dowling had been a member of the firm of Chadbourne, Stanchfield & Levy, and that this firm had at one time done some legal work for the Brooklyn-Manhattan Transit Company and the Interborough (see R. 24, fols. 71, 72; R. 72, 73, 74, fols. 215-220).

As to who shall be receiver of the Manhattan (which, so long as the lease to the Interborough continues, has practically no tangible property which would come into the possession of a receiver—in fact is, as Boehm states in her brief [p. 3], "a mere corporate shell")—there has been controversy, the clients of Mr. Franklin desiring, at the outset, the appointment of Mr. Amster as a *co-receiver* with Mr. Roberts (R. 567), and, later, the removal of Mr. Roberts on the charge that he, as President of Manhattan, had not been diligent, and on the further charge that he was not independent of Interborough influence and the appointment of Mr. Amster as *sole* receiver in his stead (R. 25, 26, fols. 75-77).

The Issue.

The sole and only question before the Court is whether Judge Manton's orders were void for want of jurisdiction. The claims now advanced by the petitioners that there was impropriety in the appointment of receivers at the suit of a simple contract creditor on the consent of the defendant, that the suit was collusive, that it was brought for ulterior purposes and other like claims, are irrelevant to any question before the Court.

While counsel for Johnson endeavored to argue before Judge Woolsey the charge that the proceeding for the appointment of a receiver of the Interborough was a "collusive one," Judge Woolsey refused to hear argument on that point (R. 848, fol. 2543; R. 931, fol. 2793). The matter was not discussed in any way in Judge Woolsey's opinion. It was not argued before the Circuit Court of Appeals and was not considered in the opinion of the Circuit Court of Appeals and is not before this Court.

The petitioner did not, either in his bill of complaint, his petition for the orders to show cause, or in his argument before Judge Woolsey, or before the Circuit Court of Appeals, attack the orders appointing Receivers of the Interborough as being "consent decrees" based upon a bill of a "simple contract creditor." That question is not before this Court.

Even assuming that such matters were properly pleaded in the bill in the *Johnson* suit and that they could be raised in that suit, they certainly could not be decided without a trial on the facts and even in advance of answer.

The motions were made on the proceedings in the *Brake Shoe* suit, the *Barber* bill and the bill, the supplemental bill and petition in the *Johnson* suit before answer (R. 123, 124). Judge Woolsey decided the matter solely as a question of law. The vacating order adjudged that the orders in the *Brake Shoe* suit be "*vacated and set aside as wholly void and of no juridical effect*" (R. 725), this for the sole and only reason, as shown by the opinion, that the proceedings before Judge Manton "were not proceedings before a judge *de jure* or before a judge *de facto,* but were acts which involved usurpation of power which he had not and, consequently, were all *coram non judice* and wholly void and of no effect" (R. 720).

SUMMARY OF ARGUMENT.

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POINT I.

Judge Manton was duly empowered to hold a District Court with all the rights, powers and duties of a District Judge.

(a) *Historical background of designations of Circuit Judges to hold District Courts.*

When Chief Justice Marshall's power to hold a Circuit Court was challenged on the ground that, under the Constitution, the Justices of the Supreme Court had appellate jurisdiction only, except in the two cases where a State or a foreign minister was a party, this Court held that the challenge came too late, that practice and acquiescence had set the question at rest.

Stuart v. *Laird*, 1 Cranch. 299.

From that time until the business of the Supreme Court made it impractical, Circuit Justices held, and were required by statute to hold, at stated intervals, Circuit Courts.

When the Circuit Court of Appeals was created, the Chief Justice, the Associate Justice assigned to each Circuit, the Circuit Judges and the *District* Judges within each Circuit, were competent to sit as Judges of the Circuit Court of Appeals.

Section 3 of the Act of March 3, 1891 (26 St. at L. 826, Sess. II, Chap. 517).

Thus the District Judges and the Circuit Judges exercised both appellate and original jurisdiction.

When the Circuit Courts were abolished upon the adoption of the Judicial Code in 1911, provision was made for the first time for the designation of Circuit Judges to hold District Courts. That provision must be construed in the light of its background. It undoubtedly was adopted because, among other reasons, the jurisdiction of the Circuit Courts, in which courts the Circuit Judges had exercised original jurisdiction, was transferred to the District Courts.

As originally passed in 1911, it read:

> "Sec. 18. Whenever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the Chief Justice, the public interest shall require, the said judge, or associate justice, or Chief Justice, shall designate and appoint *any circuit judge* of the circuit to hold said district court" (Sec. 18, Judicial Code, Act of March 3, 1911).

The first sentence of said section, as revised in 1922, now reads:

> "The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the senior circuit judge thereof, may, if the public interest requires, designate and assign *any circuit judge* of a judicial circuit to hold a district court within such circuit" (*United States Code*, Tit. 28, Sec. 22 [Judicial Code, Sec. 18]). (Italics are ours.)

Sections 17 to 21, Title 28, of the United States Code (Secs. 13 to 17 of the Judicial Code) provide for the designation of a *District* Judge of another district or circuit by the Chief Justice, the Circuit Justice or the Senior Circuit Judge, as the case may be, on account of the disability or the absence of a District Judge or the accumulation or urgency of business, and Sections 24 and 25, Title 28, of the United States Code (Secs. 20 and 21 of the Judicial Code) provide for similar designation in case of the disqualification or bias of a *District* Judge.

The provision of Section 22, Title 28, of the United States Code (Sec. 18 of the Judicial Code) for the designation of *Circuit* Judges is not thus limited. Plainly the purpose was to enable Circuit Judges to exercise original jurisdiction by holding District Courts, the same as they had previously done in the Circuit Courts, if the Chief Justice, the Circuit Justice or the Senior Circuit Judge considered it in the public interest for them to do so.

Thus the plain terms of Section 18 (of the Judicial Code) and the other sections in the context refute the assertion of petitioner Johnson that the sole public interest is "to prevent a congestion of business," and the quotations from the Con-

gressional Record on pages 27 to 29 of said petitioner's brief to support that assertion are inadequate and misleading.

The legislative history of Section 18 (of the Judicial Code) demonstrates that it was not intended to serve any such limited purpose, but that on the contrary its real purpose was to enable Circuit Judges to exercise original purisdiction in the District Courts, as they had theretofore done in the Circuit Courts, and especially to hear and determine particular cases of especial importance.

Section 18 of the Judicial Code as contained in the bill when first introduced in the House of Representatives in 1911 is identical with the section as finally enacted. The Congressional debate shows that certain Congressmen, notably Mr. Parsons of New York, one of the conferees for the House on the final passage of the bill, and Mr. Parker of New Jersey, who was then Chairman of the House Judiciary Committee, vigorously opposed any provision in the bill which would confine the Circuit Judges to appellate work.

Congressman Parsons offered an amendment to Section 116 of the Judicial Code as first read to the House to provide generally that the Circuit Judge should at all times have throughout his circuit the powers and jurisdiction of a District Judge, and he stated that the object of the amendment was to give the Circuit Judges the power that they then had. The Parsons amendment was agreed to by the House, sitting as a Committee of the Whole (Congressional Record, Vol. 46, Part 3, p. 2155). The House bill was sent to conference containing Section 18 as finally enacted and also the Parsons amendment giving Circuit Judges the powers and jurisdiction of the District Judge (Congressional Record, Vol. 46, Part 4, p. 3220). The conference report as read to the House shows that the Parsons amendment was stricken out during conference. The statement appended to the conference report contains the following as recorded on page 4001:

> "Section 118 (116). An amendment was made by the House as follows:
>
> "and, (the circuit judge) as well as the circuit justices, shall have throughout his circuit the powers and jurisdiction of a district judge.'

> The House conferees agreed to this being stricken out in view of the fact that provision for the assignment of circuit judges to sit in the district court when the exigencies of business require it was provided for by Section 18 of the act."

The striking out of the Parsons amendment was objected to by Mr. Parker (p. 4003), to whom Chairman Moon, Chairman of the Committee on Revision of Laws, replied (p. 4003):

> "In view of the fact that ample provision already existed in the bill for a circuit judge to sit as a district judge, that provision was found entirely unnecessary."

Further discussion of the Parsons amendment appears on page 4004, as follows:

> "Mr. Sherley (one of the House conferees): There was also an amendment undertaking to give to the circuit judges and justices of the Supreme Court the right to sit in district courts. As to the circuit judges, I think that right is retained in the bill although the Parsons amendment is not retained in it.
>
> Mr. Parker: How is it retained as to circuit judges?
>
> Mr. Sherley: Because at the time the amendment of the gentleman from New York (Mr. Parsons) was put on the bill, as was stated then, it was unnecessary, and simply repeating another provision in the law. The gentleman from New Jersey shakes his head, but that is not only my opinion, but that of all the conferees. As to the justices of the Supreme Court, we did not believe there was any actual need of their going into a district court, nor any possibility, considering the business of that court, of their going into a district court, and it was accordingly stricken out."

Mr. Parker, in asking that the conferees' report be disagreed to, stated at page 4006 (Congressional Record, Vol. 46, Part 4):

> "Does he (Mr. Moon) forget that in all the hundred districts of this land there are a hundred different judges, some of them weak and some of them strong, and that under the present law in great cases involving great issues, whether of trust matters or railroad

matters, the circuit court may be presided over by circuit judges who can go to those cases and can hear those cases, whereas it is now provided that no one except in the case of the disability of the district, can go into that district?

Mr. Moon of Pennsylvania: Oh, no.

Mr. Parker: Show me that section.

Mr. Moon of Pennsylvania: It provides for that when the public interests require."

In the Senate, the Congressional Record shows that when Section 18 of the Judicial Code was first read to the Senate, Senator Heyburn, in charge of the bill and one of the conferees for the Senate on the final passage of the bill, said:

> "Mr. Heyburn: I will say, in connection with this section, that it is a new provision, but one that is rendered necessary by reason of the consolidation of these courts, and it is in entire conformity with the existing practice" (Congressional Record, Vol. 45, Part 4, p. 3547).

Also see Senator Heyburn's remarks on pages 3999 and 4000 of Congressional Record, Vol. 45, Part 4.

Senator Sutherland, at the time a member of the Special Joint Committee on the Revision of the Laws and also of the Judiciary Committee and also one of the conferees for the Senate on the final passage of the bill, makes it clear that the fears expressed by Senator Bacon of Georgia, that the Circuit Judges would not be permitted to sit in the District Court, were unfounded. Senator Sutherland stated (Congressional Record, Vol. 46, Part 1, p. 840):

> "Mr. Sutherland: Mr. President, I think when we come to consider this bill, the Senator from Georgia will find that these protests are being made under a misapprehension as to precisely what the bill does provide. I think the misapprehension consists in the belief that the circuit judges will be prevented from hereafter sitting upon the trial bench. The bill does not undertake to do that at all. The bill simply consolidates the original jurisdiction in a court to be called the district court. For myself I can see no earthly reason why we should have two courts of orig-

> inal jurisdiction; but we have provided in the bill, with the utmost flexibility, for the circuit judges sitting in the district court as trial judges. I think, when we come to consider the bill, the Senator from Georgia will find that these protests are made under that misapprehension."

Consideration of the bill was concluded on February 8, 1911. At that time Senator Sutherland, in discussing Senator Root's motion to strike out the section which consolidated the Circuit and District Courts, stated as follows (Congressional Record, Vol. 46, Part 3, p. 2138):

> "This bill, however, does not destroy the flexibility which exists under the present law. The circuit judge may still go to the district court and hold court, only he will hold as a circuit judge presiding over the district court.
>
> The flexibility, however, of the whole system which permits an interchange of judges is not in any manner affected by this change in the law while we are getting rid of the conditions of which I have spoken, which are immensely expensive to the Government."

Speaking against the same motion, Senator Clarke of Arkansas, also a member of the Special Joint Committee on Revision of the Laws and one of the Senate conferees, stated (p. 2138):

> "It (the proposed consolidation) will assign to their appellate functions the judges of the circuit court, and it will reserve their right to appear upon the district bench, just as it reserves in favor of the judges of the Supreme Court of the United States whenever an occasion of sufficient importance seems to make it necessary, the right to sit in the circuit court."

Following this discussion, the Root motion was rejected and the bill was passed. The Senate bill was then rejected by the House and was sent to conference. The conference report was finally approved by the Senate (Congressional Record, Vol. 46, Part 4, p. 3853) with Sections 18 and 23 intact as originally read.

That it was contemplated and intended that Section 18 would be resorted to when important cases arose also is shown by the following colloquy between Congressman Bartlett of Georgia and Chairman Moon of the House Committee on Revision of the Laws:

> "Mr. Bartlett of Georgia: * * * But you have, as I understand it, in this amendment to the law, in section 18, which is new, made a provision by which a circuit judge can be required to go and preside in important cases whenever, in the judgment of the senior circuit judge, it is found necessary to assign a circuit judge to the district court?
>
> Mr. Moon of Pennsylvania: That is true; in order that this bill shall not require the creation of any additional judges and that the present judicial force of the country shall administer the business just as it does now.
>
> Mr. Bartlett of Georgia: So that the cases will be more frequently tried in the district court by circuit judges than in many instances they are tried now?
>
> Mr. Moon of Pennsylvania: Fully as frequently anyhow" (Congressional Record, Vol. 46, Part 1, p. 302).

Since the adoption of the Judicial Code in 1911, *every* Senior Circuit Judge in the Second Circuit, beginning with Judge Lacombe and followed by Judges Ward, Hough, Rogers and Manton (R. 553), has designated himself to hold District Courts, sometimes to hear a particular case (R. 655-661; and see *Penn. Steel Co.* v. *New York City Ry. Co.*, 221 Fed. 440). That power has been continuously exercised by the Senior Circuit Judges of other circuits, both generally and to hear and determine specific cases (R. 555, 662; and see *United States* v. *Gill*, 292 Fed. 136).

The Northern District of Illinois is more nearly comparable with the Southern District of New York than any other. The Senior Circuit Judge regularly designates himself and all the other Circuit Judges to hold District Courts in that district (R. 555).

With the knowledge of that practice, the Congress in 1922 re-enacted said Section 18 in more precise language and added

a provision expressly conferring on a judge so designated all the powers, rights and duties of a district judge, save for the specified exceptions. The omission of the clause containing the phrase "in his judgment" can have no significance since necessarily the one having the power to designate must, in the exercise of his judgment, determine the fact of public interest, and the obvious purpose of the revisers was to simplify the section without change of meaning.

Obviously the public interest might and often has required such designations for particular business; and in districts like the Southern District of New York and the Northern District of Illinois there are obvious reasons why the resident Circuit Judges should have standing designations so as to be available to suitors at all times. Wherefore, in accordance with the practice followed in the Second Circuit since 1911 (R. 554), Circuit Judges, resident in the Southern District of New York, Judge Augustus N. Hand, Judge Learned Hand and Judge Manton, have standing designations to hold District Courts in that district.

In addition to the standing designation of Senior Circuit Judge Manton to hold a District Court made on March 20, 1930, as aforesaid (R. 661), he also designated himself to hold a District Court and particularly to hear and determine all applications and proceedings in the *Brake Shoe* case on August 25, 1932 (R. 177).

District Judges of other districts or circuits can be designated only for specific reasons, i. e., on account of the accumulation or urgency of business, the disability, absence, disqualification or bias of a District Judge. *Circuit* Judges, however, are to be designated "if the public interest requires" it. Such public interest, for reasons other than those specified for the designation of District Judges, will ordinarily relate either to the particular business to be done or to conditions peculiar to a district like the Southern District of New York.

(b) *The existence of public interest justifying the designation cannot be inquired into.*

The statute does not require evidence of the fact of public interest to be presented to the judge making the designation. Necessarily he determines that from his own knowledge of the conditions in his circuit, charged as he is by the statute with supervisory authority. The designations of March 20, 1930 (R. 708) and of August 25, 1932 (R. 177) both recite the requirement of the public interest, but neither recital purports to be based on any evidence presented to the judge.

The record does *not* "affirmatively" show "what the alleged public interest was," nor does it state the "evidence" of such interest as is stated in Point II of petitioner Johnson's brief (p. 21).

The affidavit of Mr. Quackenbush (R. 175) referred to by both petitioners says nothing about the public interest. It merely shows the importance of appointing individual receivers, which is so obvious that petitioner Boehm says "it is inconceivable that a district judge would not have recognized" it (Boehm brief, p. 33).

Petitioner Boehm makes the remarkable suggestion that instead of applying to Judge Manton the parties to the *Brake Shoe* suit should have applied to a judge of the Eastern District of New York, into which the Interborough lines extend and where "trust companies are not appointed either in equity or bankruptcy," if they desired to avoid the appointment of a trust company (Boehm brief, p. 33).

The record discloses that the *Brake Shoe* bill was filed in the Eastern District of New York and that the same receivers were there appointed by Judge Campbell (R. 583), a cogent reason for not now creating chaos and confusion by attempting to appoint other receivers in the Southern District in another suit, and an equally cogent reason why the petitioners' objections, if they have any, should have been made in the *Brake Shoe* suit.

Petitioner Boehm concedes "that the exercise of the power conferred upon the senior circuit judge is ordinarily conclusive and may not be challenged at *any* time and in *any* proceeding where his order of designation may be involved," but claims that that conceded rule does not apply "where it clearly and fully appears that the senior circuit judge has acted upon grounds unauthorized by the statute" (Boehm brief, p. 29). To support that statement she refers to the opinion of Judge Manton, which is not in the record, which was not before Judge Woolsey and was not even written until after Judge Woolsey's decision. That opinion, if the Court sees fit to refer to it, disproves the statement that the Senior Circuit Judge acted upon grounds unauthorized by the statute (1 Fed. Supp. 820).

Said petitioner concedes that the objection must be "*timely*" and made "at the beginning" of the case. Obviously, if lack of public interest goes to the jurisdiction of the Court, timeliness is of no consequence, and it can be inquired into. The position taken is tantamount to a concession that lack of public interest is not jurisdictional. If it is not jurisdictional, it, of course, cannot be inquired into.

Whilst we are not concerned on this appeal with the reasons for Judge Manton's conclusion that the public interest required his designation, both generally to hold a district court and specifically to hear the *Brake Shoe* case, which conclusion is not reviewable, the petitioners themselves demonstrate that the case was one of unusual importance and public interest. Petitioner Boehm refers to it in her brief as "a receivership involving so great a public interest" (p. 33), and as a case of "great economic, social and even political significance" (p. 15).

Boehm, in her brief, even asserts that public interest attaches to the question of the appointment of individuals as Receivers for such a company as the Interborough. In pointing out that the District Judges had not adopted a practice of uniformly appointing the Irving Trust Company as re-

ceiver in equity cases, though they do so in bankruptcy cases, Boehm says, page 45:

> "In equity cases the District Judges have not taken so drastic a step—influenced perhaps to some extent by the opinions similar to that of Judge Manton that some equity receiverships require, in the *public interest*, that individuals be appointed." (Italics ours.)

Johnson, in his supplemental bill of complaint, paragraph VIII (R. 56, fol. 168), after setting out at length some of the issues in the Interborough Receivership which he says are "bound to arise and will require judicial determination" (such as important questions arising under the Manhattan lease), goes on to say:

> "The foregoing are not idle or moot questions stated for the purpose of alarming the court. They are vital questions affecting the future of both companies * * *. The amounts involved on each issue will probably run into many millions of dollars. The *public interest* is seriously involved in most, if not all of the issues raised." (Italics ours.)

As to what is embraced within the phrase "public interest," see

> *Lawrason* v. *Swartz*, 132 La. 511, 61 So. Rep. 554 (1913).

It was, then, peculiarly the kind of case for a circuit judge, and certainly for the senior circuit judge to take jurisdiction of, if he thought he could spare the time from his other duties, and that was for him alone to decide. It was peculiarly the kind of case which the district judges, with the burden of their congested calendars, would naturally be glad to be relieved of. It was peculiarly the kind of case which the Congress thought circuit judges would be designated to hear when in 1911 it preserved the existing flexibility of the judicial system and the interchangeability of judges between appellate courts and courts of original jurisdiction, and pro-

vided for the exercise of original jurisdiction by circuit judges in the district courts, the same as they had theretofore exercised such jurisdiction in the circuit courts.

In any case, the sole responsibility and duty is upon the one having the power to designate. The decision as to the public interest is vested in him. He acts administratively. If his decision be the subject of review or collateral attack, no litigant could safely submit any business to a designated Judge.

In *Ex parte American Steel Barrel Co.*, 230 U. S. 35, application was made for a writ of mandamus to command Judge Chatfield, District Judge of the United States for the Eastern District of New York, to resume jurisdiction and proceed to hear and determine the matters in the case of "In re Ironclad Manufacturing Company." During the course of the proceeding of this case before Judge Chatfield, an affidavit of bias was filed. Whereupon, Judge Chatfield, pursuant to the provisions of Section 25, Title 28, of the United States Code, certified the situation to Judge Henry E. Lacombe, Senior Circuit Judge for the Second Circuit, who thereupon, pursuant to the provisions of Sections 25 and 17, Title 28, of the United States Code, designated Judge Mayer of the Eastern District to hear the case. The contention in the mandamus proceeding was that Judge Chatfield was not disqualified and that accordingly a designation of Judge Mayer was improper and Judge Mayer was entirely without jurisdiction to proceed, but that the matter should continue before Judge Chatfield.

The Court took the view that even if Senior Circuit Judge Lacombe had not acted strictly in pursuance of the authority conferred on him by statute, if he had "made a mistake," nevertheless his action was not subject to review. The Court said (230 U. S. 45, 46):

> "Judge Lacombe was clearly called upon to determine in the exercise of his jurisdiction as the Senior Circuit Judge, whether the situation was one in which he should designate a Judge in the room and place of

> Judge Chatfield. He determined the matter adversely to the petitioners. If in this he made a mistake, it was one made in the course of the exercise of his legitimate jurisdiction under sec. 14 of the new Judicial Code, and we cannot compel him through a writ of mandamus to undo what has thus been done."

A statute of New York State authorizes the Governor to appoint an extraordinary term of the Supreme Court, designating the Justice to hold it "whenever in his opinion the public interest so requires." A designation by the Governor under that statute of a Justice to hear and determine motions for new trials in specific actions, and, if granted, to try them, was held by the Court of Appeals of New York to be beyond the province of the courts to inquire into.

> *People ex rel. S. L. & T. Co.* v. *Supreme Court*, 220 N. Y. 487.

People v. *Ballard*, 134 N. Y. 269, had to do with an action brought in the name of the People of the State of New York by the Attorney General to remove the directors of a domestic business corporation from their positions for misconduct and to compel them to account. The statute provided that the action might be brought by the Attorney General "if, in his opinion, the public interests required that an action should be brought." The Court held (134 N. Y. 293):

> "* * * the question as to what the public interests require is committed to the absolute discretion of the attorney-general, and it cannot be made the subject of inquiry by the courts. If he abuses the great power intrusted to him, a remedy may be found in his removal from office, or in the election of a successor worthy of the high position."

(c) *The designation could not be attacked collaterally for want of public interest.*

Judge Woolsey properly denied the appellants' motions in so far as they attacked the designation order and the appellants have not sought to obtain a review of such denial.

If a collateral attack could be made on that ground even in the very suit in which jurisdiction was exercised, chaos and uncertainty would result; and if permitted in a collateral suit, no judgment or decree made by a designated Judge would ever have finality; and a Judge of the District Court would be given the power to determine the validity of a designation—a power certainly not contemplated by any provision of the Judicial Code.

(d) *It is inconceivable that the fact of public interest can be inquired into, but, in any event, inquiry must necessarily be made in some procedure adequate for the purpose.*

In so important a matter as the determination that a Senior Circuit Judge, who is actually holding a District Court under a designation, was acting as an usurper because of a lack of public interest sufficient to warrant his designation—certainly the determination of lack of public interest should not be reached in any casual manner or on the basis of unsupported allegations or without some opportunity for the parties vitally interested in the determination, including the designating Judge, to make some proof of the facts in the situation. This would seem to be obvious and fundamental.

Yet this Court is asked to reach this determination on a record which contains no basis whatsoever for such a determination. The bill of Johnson alleges that there was "no question of public interest involved" (R. 55), and the bills of Johnson and Boehm contain identical allegations that the Designation Order was "irregular, improper, without legal warrant or justification, and void" (R. 103, 121). See also (R. 97).

These allegations of conclusions are all made in conjunction with allegations which show that the conclusions were

based upon contentions that the Designation Order was a violation of Rules 1-a and 11-a, and not that they were void for lack of public interest to justify the making thereof. These unproven allegations constitute the *only* basis in the record for any finding of lack of public interest.

Without anything more in the record than these unsupported allegations by way of conclusions, without any proof to sustain them, without any issue taken thereon, without any trial of that issue, the petitioners now ask this Court to determine as a fact that there was no public interest to justify the Designation Order. While it is inconceivable that the fact of public interest may be inquired into, we submit that if the fact of public interest is open to investigation, either directly or collaterally, there must be some procedure involving a trial of the issue, and that an essential part of that procedure would involve an examination of the designating Judge (be he Chief Justice of the United States, or the Circuit Justice, or the Senior Circuit Judge) as to the public interest upon which he relied in making the designation.

People v. *Ballard*, 134 N. Y. 269, referred to at page 30, *supra*, is in point. It held that in a case in which the Attorney General of the State of New York was to act "if the public interest requires" the fact of public interest was not an issuable fact, saying (134 N. Y. 293):

> "If it were held otherwise, upon what evidence could the court proceed?"

The Court shows that if the question could be examined into, an intolerable multiplication of issues would be produced and that they could not be easily defined by pleadings and unless so defined could not be tried (134 N. Y. 293).

(e) *Designations of Circuit Judges to sit in a particular case are proper.*

We have already pointed out that the making of designations for the trial of a particular case or a class of cases has been a uniform practice (R. 554, 555, 655, 659, 660, 661,

662). The right to do so was approved in *United States* v. *Gill*, 292 Fed. 136 (C. C. A., 4th). The right to do so was in the mind of Congress in 1911 in enacting Section 22 (see pp. 21, 22, *supra*). See *State* v. *Leib*, 17 N. M. 270, 125 Pac. 601, 602 (1912).

Section 23, Title 28, of the United States Code provides, among other things, that—

> "It shall be the duty of the district or circuit judge who is designated and appointed under either of sections 17 to 22 of this title, to discharge all the judicial duties *for which he is so appointed,* during the time for which he is so appointed; * * *." (Italics ours.)

thereby expressly contemplating that the designation may have been for particular duties and for a limited time.

Apart from the reasons for *standing* designations in a district like the Southern District of New York, and apart from the reasons specified by the statute for the designation of District Judges of other districts or circuits, the public interest requiring a designation will necessarily relate to some particular business of the Court. It was manifestly the intention of the Congress to confer the power on the Chief Justice, the Circuit Justice or the Senior Circuit Judge to designate Circuit Judges to hear and determine particular matters deemed of special importance. The contrast between said Section 22, governing the designation of Circuit Judges, and Sections 17, 19, 20, 24 and 25, governing the designation of District Judges, puts that beyond doubt or debate.

(f) *The uniform and general practice since the adoption of the Judicial Code in 1911, of the Senior Circuit Judges in designating themselves and in making both general standing designations and designations for a particular case, should put the question at rest.*

Stuart v. *Laird*, 1 Cranch. 299.

The universal practical construction for so long a time should be conclusive.

United States v. *Hermanos y Compania,* 209 U. S. 337, 339.

Robertson v. *Downing,* 127 U. S. 607, 613.

United States v. *G. Falk & Brother,* 204 U. S. 143, 152.

The legislative history of the revision of 1922 is of great significance.

The bill originated in the House. By Section 6 of the House bill, Section 18 of the Judicial Code was rephrased, as stated *supra* (pp. 24, 25), so as to express the same thought in simpler and fewer words.

When the bill came to be reported by the Senate Judiciary Committee to the Senate, Sections 13 to 18 of the Judicial Code had been completely recast. Section 13, as so recast, provided for the designation of District Judges by the Senior Circuit Judge (a) on account of the disability or absence of the District Judge, (b) "in aid of a District Judge" on account of the accumulation or urgency of business, and (c) "in aid of a District Judge when the public interests so require"; and Section 14 was amended to read as follows:

> "(1) A circuit judge may be designated to act as district judge in any district of his circuit or of attached territory in any case where a district judge might be so designated.
>
> (2) Such designation may be made by the senior circuit judge (who may designate himself) whenever he is satisfied that the occasion therefor exists and that the public interests so require" (*Congressional Record,* Vol. 62, Part 3, p. 2584).

In reading the bill as reported to the Senate, Senator Cummins, Chairman of the Judiciary Committee, explained that Section 14 thereof, just above quoted, did not differ essentially from the present law, and with reference to subdivision (2) thereof he said:

> "That is simply a better and more complete expression of the thought of the existing law" (*Congressional Record,* Vol. 62, Part 5, p. 4852).

The statute then provided (Judicial Code, Sec. 18) and now provides (Sec. 22, of Title 28, of United States Code) for the designation by the Chief Justice, the circuit justice or *the senior circuit judge* of *"any circuit judge"* of the circuit. The words "any circuit judge" are all-inclusive and necessarily include the senior circuit judge.

Some of the Senators thought the power of designation subject to abuse. Others objected to the provisions for annual conventions to be called by the Chief Justice; and various amendments were proposed, but all of the proposed amendments to the bill as reported by the Judiciary Committee were rejected (*Congressional Record,* Vol. 62, Part 5, pp. 5166-5174) and the bill as reported by the Judiciary Committee was passed by the Senate (*id.,* p. 5174).

The Conference Committee reported a bill which, in general, followed the original House bill rather than the recast of it made by the Senate Judiciary Committee, and the bill so reported became a law. The first sentence of Section 18 of the Judicial Code, as finally amended (now Sec. 22, of Title 28, of the United States Code), is the same as said Section 18 in the original House bill, with the following provisions added:

(1) The provision for the designation by the Chief Justice of Judges of the United States Court of Customs Appeals for service in the Supreme Court of the District of Columbia or the Court of Appeals for the District when requested by the Chief Justice of either of said courts;

(2) The provision that designated Judges "shall have all the powers and rights and perform all of the duties of a judge of a district or a justice of the court to which he has been assigned," save for the exceptions noted, and that in case of an unfinished trial before the expiration of the period of service, such period shall be deemed extended until the trial is concluded; and

(3) The provision empowering a designated Judge, despite his absence from the district and the expiration of the time limit in his designation, to decide all matters submitted to him, to decide motions for new trials, settle bills of exception, and the like (*Congressional Record*, Vol. 62, Part 9, p. 9497).

The substantial re-enactment of said Section 18 of the Judicial Code, with the addition of the provision giving a designated Judge all of the rights and powers and duties of a District Judge, save for the exceptions, and the rejection of all amendments limiting the power of designation, sets at rest any possible question as to the regularity of the well known practice of Senior Circuit Judges to designate themselves, both generally and to hear and determine specific matters.

Such re-enactment was a confirmation by the Congress of the practice that had prevailed since the adoption of the Judicial Code and was an adoption of that construction of said Section 18 of the Judicial Code by the Congress itself (Sec. 22, of Title 28, of the United States Code), which should now be conclusive.

U. S. v. *G. Falk & Brother,* 204 U. S. 143, 152.
Copper Queen Mining Co. v. *Arizona Board,* 206 U. S. 474, 479.
U. S. v. *Hermanos y Compania,* 209 U. S. 337, 339.
Heald v. *District of Columbia,* 254 U. S. 20, 23; 65 L. Ed. 106, and exhaustive note citing cases.
Brewster v. *Gage,* 280 U. S. 327, 337.
McCaughn v. *Hershey Chocolate Co.,* 283 U. S. 488, 492, 493.
Old Colony R. Co. v. *Commissioner,* 284 U. S. 552, 557.

(g) *As a properly designated Judge either under his standing designation of March 20, 1930, or under his designation of August 25, 1932, Judge Manton had all the rights, powers and duties of a District Judge.*

It is expressly so provided by statute. By Section 23, of Title 28 of the United States Code (Sec. 19 of the Judicial Code), a judge so designated is commanded "to discharge all the judicial duties for which he is so appointed," thus plainly contemplating designation for particular duties, i. e., particular cases, "and all the acts and proceedings in the courts *held by him, or by or before him* * * * shall have the same effect and validity as if done by or before the district judge of the said district."

And Section 22, Title 28, of the United States Code (Sec. 18 of the Judicial Code) provides that a judge so designated "shall have all the powers, and rights, and perform all the duties, of a judge of the district * * * (excepting the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds)." The exceptions emphasize the inclusion of all other powers.

This Court said in *Ex parte United States*, 226 U. S. 420, 423, 424:

> "It is moreover beyond question that the statute while contemplating as a general rule the holding of District Courts by district judges and as a general rule for holding Circuit Courts of Appeal by circuit judges, nevertheless expressly directs when the occasion requires (Sec. 18) the assignment by the senior judge, or the circuit justice, or the Chief Justice of a circuit judge to hold a District Court and endows a judge so assigned with all the authority of a district judge (Sec. 19), giving power in case of such designation to hold separately at the same time a District Court in such district, and to discharge all the judicial duties of the district judge therein (Sec. 14). The statute therefore clearly gives to the circuit judges the rights and powers of judges of the new District Courts, and calls such powers into play when assigned according to law."

POINT II.

The District Judges were without power to deprive designated Judges, whether Circuit Judges or District Judges, of the authority and jurisdiction vested in them by the statute.

The concurrence of District Judges in designations is not required, though the concurrence of a majority of the Circuit Judges in rules of the District Court regulating the practice in suits in equity is required by Equity Rule 79.

Judges designated to hold a District Court are neither outsiders nor intruders in the district, as Judge Woolsey seemed to suppose. They are expressly required by statute without their consent to accept such assignment and are expressly given all of the powers and rights and are commanded to perform all the duties of a Judge of the district, save for the specified exceptions (Sec. 22, Title 28, United States Code; Sec. 18, Judicial Code), and by Section 23, they are commanded to perform all the judicial duties for which they are appointed during the time for which they are so appointed. Yet under Rule 1-a adopted by the District Judges they can do no "work" at all except "such work" as may be assigned by the Senior District Judge. Although, in the opinion of the Chief Justice, a Circuit Justice or the Senior Circuit Judge, the public interest may require the designation of a Circuit Judge to hold a District Court, the Judge so designated must, under said rule, get the consent of the Senior District Judge before he can do any "work" in the Court which he is designated to hold, and without such consent he is an "outsider," an "intruder" and, if he does do any work, an "usurper."

Section 13, Title 28, of the United States Code (Sec. 9 of the Judicial Code) provides:

> "SEC. 13. *Courts open as courts of admiralty and equity.* The district courts, as courts of admiralty and as courts of equity, shall be deemed always open for

> the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. *Any district judge* may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court." (Italics ours.)

Federal Equity Rule No. 1 similarly provides. Federal Equity Rule No. 6 provides:

> "Each District Court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. * * *"

The manifest intention of said statute and rules was to insure to suitors accessibility to the Courts at all times and places. The Court is not a place; the Judge constitutes the Court, and he is commanded by the statute to keep his Court "*always open*" for the purpose, among others, of making interlocutory orders and under said Equity Rule No. 6 he may make such orders "at any time and place."

As was said by Judge Hough in *Ackerson* v. *United States*, 15 Fed. (2nd) 268 (C. C. A., 2nd, 1926), at 270:

> "The power of suspension (of a sentence) is lodged in the court, and any acting judge constitutes the District Court."

That the orders in the *Brake Shoe* suit set aside by Judge Woolsey were interlocutory admits of no doubt. See *Horn* v. *Pere Marquette*, 151 Fed. 626 (C. C., E. D. Mich., S. D. 1907, opinion by Judge Lurton).

The appointment of receivers is usually emergency business. The suitor has the right to apply to the Judge wherever he can find him. But although a designated Judge is given all the rights, powers and duties of a District Judge, if a suitor applies to him, no matter how great the emergency, under the District Judges' Rule 1-a, the designated Judge (in this case the Senior Circuit Judge) must seek out the Senior District Judge and get the latter's consent to his doing "such work" before he can act; and under Rule 11-a, whether he be a designated Judge or a District Judge, he cannot act on an application for the appointment of receivers unless "assigned to hold the bankruptcy and motion part." The Judge so assigned may not be available. He may be disqualified. [Indeed the records of the District Court disclose that when a motion was later made in the *Johnson* suit before Judge Patterson, the Judge assigned to hold the bankruptcy and motion part on August 26, 1932, he stated that he considered himself disqualified by reason of the fact that the firm of which he was a member when he went on the bench had been counsel for the Manhattan Railway.] Still, no matter how urgent, the business must wait until all the Judges can make another assignment, if said Rule 11-a have the effect ascribed to it by Judge Woolsey, or until the designation of another Judge by the Senior Circuit Judge under Section 24, and even such Judge, though specially designated because of the disqualification of the Judge holding the motion part, would still have to secure an assignment to that part and the consent of the Senior *District* Judge before he could act, if said rules have the effect claimed. Manifestly that would defeat the very purpose of said Section 13 of the United States Code and of Equity Rules 1 and 6 and the express provisions of said Sections 22 and 23.

No rule can "enlarge or restrict jurisdiction" or "abrogate or modify substantive law."

Washington-Southern Co. v. *Baltimore Co.*, 263 U. S. 629, 635.

Hudson v. *Parker*, 156 U. S. 277.

Davidson Marble Co. v. *Gibson*, 213 U. S. 10.
General Electric Co. v. *Marvel Co.*, 287 U. S. 430, 434.
Venner v. *Great Northern Railway*, 209 U. S. 24, 35.

Designated Judges, whether Circuit Judges or District Judges of other districts, derive their power and authority from the statute. No District Judge or group of Judges can by so-called rules restrict or take away the jurisdiction so conferred. They cannot by rule or otherwise make a Judge designated under the statute by the Chief Justice, a Circuit Justice or the Senior Circuit Judge, an "usurper" or an "intruder" in their "house," nor can they thus deprive him of the jurisdiction conferred on him by statute, much less of his title to office.

Petitioner Boehm's main contention appears to be that regardless of whether the questions argued have been properly raised, and regardless of the vast interests involved in the litigation, the Supreme Court should undertake to exercise a supervisory power over a disagreement between the senior circuit judge and the district judges in matters of administration (Boehm brief, Points I and II)

It undoubtedly is the fact, and indeed it is apparent on their face, that Rules 1-a and 11-a were adopted for the very purpose of preventing the exercise of jurisdiction by a circuit judge designated under said Section 22. If that was their purpose, as the petitioners themselves appear to suggest, they are plainly invalid. There is no warrant whatever in the statute for the exercise of such authority. The district judges are given no voice in the designation of circuit judges to hold district courts, not even so much as to make recommendations or requests, though of course a proper request would be heeded by the designating authority.

A rule of the district judges that a designated judge should not hear applications for the appointment of receivers would plainly be an unlawful attempt to limit or restrict jurisdiction conferred by the statute. The like cannot be done by indirection.

If the said rules are to be considered as an arrangement for their convenience, among judges exercising co-ordinate jurisdiction, as mere "calendar" rules, they are entirely innocuous as far as any question now before the court is concerned. They would not deprive even the judges who signed them of jurisdiction. They certainly would not be permitted to prejudice the rights of litigants.

POINT III.

So-called Rules 1-a and 11-a adopted by the District Judges are invalid.

For convenience we repeat them:

> "1-a. Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as may be assigned to him by the senior district judge."
>
> "11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy Rules) shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the court *and to no other judge.*" (Italics ours.)

Rule 1-a frankly restricts the power of designated Judges only. It does not apply to the regularly appointed District Judges. The designated Judges may do "such work only" as may be assigned them by the Senior District Judge.

Rule 11-a restricts the jurisdiction of all, whether District Judges or designated Judges. But both rules are of a piece.

The power of the District Court to make rules is to be found in Section 731, Title 28 of the United States Code.

Section 731 provides:

> "*Rules of practice in district courts.* The district courts may, from time to time, and in any manner not

inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under Section 730 of this title, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

(a) *Rules 1-a and 11-a were not adopted in accordance with the requirements of the statutes.*

If they are rules of practice at all, then, in so far as they affect the *practice in equity suits,* they are necessarily rules of practice in equity. Rule 11-a in express words applies to "the appointment of receivers in equity causes."

In that view they required the concurrence of a majority of the Circuit Judges.

Section 730, Title 28, United States Code.
Federal Equity Rule No. 79.

They do not purport to have had such concurrence (R. 16) and in fact they did not have it (R. 554 fols. 1662, 1663). Although that is undenied, petitioner Boehm says that a majority of the circuit judges may "verbally or by tacit acquiescence" have concurred (Boehm brief, p. 43). That emphasizes the character of said rules. The rights of litigants certainly cannot be affected by rules dependent upon verbal or tacit acquiescence of judges.

To get around the necessity of the concurrence of a majority of the Circuit Judges, Judge Woolsey minimized Rule 11-a to a mere direction to litigants, a signpost pointing "to the door of the room" where particular business could be done (R. 714, fol. 2140); but for the purpose of depriving Judge Manton of jurisdiction and even of his status as a Judge, Judge Woolsey magnified it into a rule of substantive law, with the consequence that a suitor who should submit his business to a Judge sitting behind the wrong door, but otherwise of competent jurisdiction, would later find to his sorrow

that the acts relied on were *coram non judice* and subject to collateral attack, because not done by a Judge at all but only by an individual without even the color of authority, a mere "usurper."

It matters little which horn of the dilemma be chosen. If the rule is a mere signpost, it is not a rule of practice at all and said Section 731 furnishes no warrant for it. If it is a rule of such plenitude of power as to deprive a Judge acting contrary to it even of his status as a Judge, it certainly cannot affect proceedings in equity unless it have the concurrence of a majority of the Circuit Judges.

We confess our inability to follow Judge Woolsey's reasoning that "practice in equity receivership cases only commences after the making of the order of appointment" (R. 714, fol. 2141). We had supposed that filing the bill was ordinarily the first step in the practice in an equity case, the same as in any other case. That gave the Court jurisdiction, and Judge Woolsey holds that the District Court still has jurisdiction of the *Brake Shoe* suit solely by reason of the filing of the bill, even after all the interlocutory orders have been vacated (R. 720).

Nor considered merely as "general" rules were they adopted in accordance with the requirements of Section 731. The statute gives power to make rules to the "District *Courts,*" and not to the Judges thereof or any number of such Judges. The records of the Court show that when these rules were adopted by the eight regularly appointed Judges of the Southern District of New York, Circuit Judge Julian W. Mack was holding a District Court for the Southern District of New York pursuant to designation of the Chief Justice, dated November 11, 1930, made under Section 201 of the Judicial Code (U. S. Code, Title 28, Sec. 214), that Circuit Judge Manton was holding a District Court for the Southern District of New York pursuant to standing designation and actually sitting in certain matters, that Circuit Judges Learned Hand and Augustus Hand had standing designations to hold a District Court for the Southern District of New York, and that United States District Judge William I. Grubb was holding a District Court in the South-

ern District pursuant to designation of the Chief Justice. Although these five designated Judges had "*all* the powers" of a District Judge "save only the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds," there is no pretense that any of them or any of the Circuit Judges for the Circuit, let alone a majority of them, were so much as consulted in the making of the rules (R. 694, 714).

Empowered to hold District Courts, with all the rights, duties and powers of the District Judges, they necessarily had, perforce of the express provisions of said Section 731, the power and right to make rules governing the practice in their courts.

(b) *The so-called rules are not rules of practice.*

Plainly Rule 1-a restricting the jurisdiction of a designated Judge so that he may do "such work only" as the Senior District Judge permits is not a rule of practice. The Senior District Judge has nothing to say about the designation of Circuit Judges to hold District Courts. Whether such designation shall be made is solely for the Chief Justice, the Circuit Justice or the Senior Circuit Judge to determine.

Neither the Senior District Judge, nor all of the District Judges together, are given any power to say what "work" a designated Judge may do or whether he shall be permitted to do any work at all, and they cannot confer such power upon themselves by passing a so-called rule and calling it a rule of practice.

Nor is Rule 11-a in any true sense a rule regulating the practice concerning "the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default * * * matters in vacation" (Sec. 73 of Title 28 of the United States Code) or "the practice, proceedings and process, *mesne* and final" (Federal Equity Rule 79), or the like.

It does not even point to the door of the room where particular business can be transacted, as Judge Woolsey sup-

posed. It merely points to the Judge "assigned" to hold a particular part. That Judge and he alone is to keep his Court "always open" for the purpose of entertaining applications for interlocutory orders appointing receivers in equity. That Judge and he alone is to make "at chambers or in the clerk's office, and in vacation as well as in term," interlocutory orders appointing receivers in equity, although the statute says "*any district judge* may, upon reasonable notice to the parties, make, direct and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court." (Italics ours.)

Rules which purport to give the Senior District Judge power to tell a designated Judge what "work" he can do, and which forbid all the Judges except one to exercise the jurisdiction conferred upon them by the statute, are not rules of practice. They are attempts to restrict the jurisdiction conferred by statute on designated Judges and District Judges as well.

(c) *The two rules do not meet the requirement of Section 731 that they be "not inconsistent with any law of the United States or with any rule prescribed by the Supreme Court under Section 730."*

They are clearly inconsistent with the plain statutory provisions of Sections 22 and 23, Title 28, of the United States Code considered under Point I above, depriving the designated Judges of the broad powers and interfering with their performance of the broad duties imposed upon them by those statutes. These rules are also clearly inconsistent with the plain statutory provisions of Section 13 of Title 28, considered under the preceding Point II above. They are also plainly inconsistent with Federal Equity Rules Nos. 1 and 6; Equity Rule No. 1 being practically a copy of Section 13.

Federal Equity Rule 6 provides:

> "* * * but the judge may *at any time and place*, and on such notice, if any, as he may consider reason-

> able, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes." (Italics ours.)

Rule 1-a in effect says that Equity Rule 6 shall not apply to a designated Judge except upon assignment from the Senior District Judge, and Rule 11-a says that Equity Rule 6 shall not apply to any Judge of the District Court whether regularly appointed or designated, in so far as the interlocutory order sought has to do with the appointment of a receiver.

Rules 1-a and 11-a are also inconsistent with Sections 17, 18 and 28, Title 28, of the United States Code.

Rule 1-a is also inconsistent with Sections 375, 376, 378, 387, 452, 647, 739, 776, Title 28, and 611, Title 18, of the United States Code.

(d) *The two rules are not authorized by Section 27, Title 28, of the United States Code.*

Section 27 provides:

> "DISTRICTS WITH MORE THAN ONE JUDGE; DIVISION OF BUSINESS. In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district."

Judge Woolsey, who was one of the District Judges who made these rules, did not attempt to support these two rules by Section 27. He found his only authority for them in Section 731 (R. 713, 883, fols. 2648-2649). The appellants, however, now seek to support Rule 11-a under Section 27 as being a division of business among the Judges. That rule is clearly not in any sense a division of business nor an assignment of cases for trial. A rule which requires a litigant to make his application for a receiver to the Judge assigned to the Motion Part, has no relation whatsoever to the division of business between the individual Judges. An agreement as

to the division of business among the Judges is an arrangement by which they determine from day to day, or week to week, as to what individual Judge shall actually sit on a particular day in the Motion Part, as well as in the other parts of the court. Obviously, notwithstanding Rule 11-a, disagreements might frequently arise as to who was actually to sit in the Motion Part.

The petitioner Boehm says, on page 39 of her brief, with relation to said Section 27 that before Judge Manton acted the eight District Judges had "unanimously agreed upon the distribution among them of the Court's business for the current year. They had unanimously agreed upon and posted a schedule setting forth the sessions which each of them was holding during the period and the character of the business which each would then administer." That statement evidently refers to the schedule of "Assignment of judges and division of work" referred to by Judge Woolsey (R. 701).

Said schedule of assignments is an example of an agreement among judges for the division of business under said Section 27. It did assign individual judges to the particular parts of the court for the stated period. It did eliminate the chance of disagreement as to what judges should hold particular parts at stated times, but said Rules 1-a and 11-a decided no question as to what any particular judge should do or what part he should hold.

Said Section 27 was wholly unnecessary to enable the District Court judges to agree upon the assignments of judges. That was the natural thing for them to do and they needed no statutory authority. The obvious purpose of the statute was to give final authority to the Senior Circuit Judge if there was a dispute, and the matter of special significance is that he was given the final word. The statute plainly recognizes that his is the chief administrative authority for the circuit. The Senior Circuit Judges compose the annual conferences to be called by the Chief Justice (Sec. 218, Title 28, U. S. Code).

The petitioner Boehm, recognizing the infirmities of the petitioners' case, frankly asks this Court to lay to one side

the rules governing its review of the decisions of the lower courts and to exercise some general supervisory authority. But the statute vests the supervisory authority in such matters of administration as the division of business in the Senior Circuit Judge.

The statute neither expressly nor by implication gives the resident district judges, whether one or more than one, any supervisory authority over the designation of Senior Circuit Judges to hold District Courts. The statute does not provide that such designations be made on their request, and it gives them no power to determine what duties a designated judge shall perform.

To the contrary it says, with respect to Circuit Judges, that they "shall have all the powers, and rights, and perform all the duties, of a Judge of the district" save for the powers expressly excepted (Sec. 22), with respect to designated Judges from other districts or circuits, that they "may hold separately and at the same time a district court in the district or territory to which such Judge is designated and assigned and discharge all the judicial duties of the district or territorial judge therein" (Sec. 18), and with respect to either a designated District or Circuit Judge, that he shall "discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district" (Sec. 23).

True, disagreements might arise between designated judges and the resident district judge or judges over the division of business. If said Section 27 was intended to apply to such disagreements, as well as to disagreements among or between the resident district judges, it is quite plain that the designated judge must have a voice in any division of business affecting the performance of his duties, and that in case of disagreement the Senior Circuit Judge would have the final say, for it cannot be supposed that it was the intention of Congress to give the resident district judges, in districts having more than one, power over the duties to be

performed by a designated judge not given to the resident district judge in a district having but one. If that had been the intention, it would have been stated in express terms and not indirectly by conferring power upon the Senior Circuit Judge to act as umpire in the case of disagreements over the division of business between district judges.

If, however, said Section 27 was intended to apply only to disagreements among the resident district judges over the division of business, it necessarily follows that it was not intended to affect in any way the discharge of duties by a designated judge which were to be governed solely by the express provisions of Section 23.

It is unnecessary to enumerate the many reasons which might properly move the Chief Justice, the circuit justice or the senior circuit judge to designate a circuit judge to hear and determine a particular matter. The importance of the matter alone might be a sufficient reason. The petitioner Boehm refers to this case as one of "great economic, social and even political significance" (p. 15). It did then involve the public interest.

It is well known that the District Courts of the Southern District of New York, with all the help they can get from outside, are not sufficiently manned to dispose expeditiously of the business pending in those Courts (R. 556-559). As petitioner Johnson says (brief, pp. 10, 11), a receivership like that of the Interborough Rapid Transit Company demands a great deal of time of the judge having jurisdiction of it. If the Senior Circuit Judge felt that he was able, with his appellate duties, to devote the necessary time and thus to that extent relieve the District Courts of the pressure of work upon them, he had the power under the statute to designate himself for that reason alone, regardless of what the district judges themselves might think about it. The sole responsibility and duty of decision was his, and no arrangement among the resident district judges for the division of business as between themselves could deprive him of his power under the statute to act or of his jurisdiction, which the parties to the suit invoked.

His so-called division of business order was separate and distinct from the designation order, and indeed recited the designation order (R. 178, fol. 534). It was made because of said Rule 11-a and doubtless did construe it as a division of business. On that construction, if said Section 27 was intended to apply to disagreements between designated and resident judges, he was the final authority. In our view, however, said order was wholly unnecessary, just as said rule was wholly ineffective to deprive him of the jurisdiction conferred on him by statute.

Petitioner Boehm concedes, to be sure, for the sake of argument, that designated judges are district judges for the purpose of said Section 27 (Boehm brief, p. 47).

It matters little which hypothesis be accepted.

If designated judges are to be regarded as district judges within the meaning of said section, said rules required the assent of the designated judges and non-assenting judges were not affected by them.

If, however, said section was intended to apply only to disagreements among or between resident district judges, then the senior Circuit judge has the final word under said Section 27, and under Section 22 he has the power to designate any circuit judge, including himself, whose powers and duties are wholly defined by the statute and are not dependent at all upon agreements or disagreements under Section 27.

POINT IV.

Rules 1-a and 11-a, even if valid, do not have the effect of depriving a Judge of the jurisdiction conferred upon him by the statute, whether he be a Judge *de jure* or *de facto*.

Undoubtedly a rule affecting the rights of litigants has the force of law, as, e. g., a rule limiting the time within which a notice to set aside a judgment must be made.

> *Rio Grande Irrigation Co.* v. *Gildersleeve*, 174 U. S. 603.

Likewise, an attorney who makes a contract for a division of fees in violation of public policy and a rule of court authorized by statute may not recover upon it.

Weil v. *Neary*, 278 U. S. 160.

The disregard of a procedural rule may constitute error reviewable on appeal, but procedural rules may be waived in the interest of justice and the disregard of them does not affect the jurisdiction.

Abbott v. *Brown*, 241 U. S. 606.

> "Every court of equity possesses the power to mould its rules in relation to the time and manner of appearing and answering, so as to prevent the rule from working injustice; and it is not only in the power of the court, but it is its duty to exercise a sound discretion upon this subject, and to enlarge the time, whenever it shall appear that the purposes of justice require it."
>
> *Ex parte Poultney* v. *City of LaFayette*, 12 Peters 472.

> "And it is also in the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it."
>
> *United States* v. *Breitling*, 20 How. 252.

See:

> *Woodbury* v. *Jergens Co.*, 61 Fed. (2d) 736 (C. C. A., 2d, 1932).

An arrangement among Judges that one of them, i. e., the one who happens to be assigned to hold a particular part, shall transact a particular part of the business of the court is, at most, an arrangement of convenience not affecting jurisdiction.

There are numerous State decisions to the effect that despite rules for the apportionment of business into "parts," each Judge in every part has the power that any Judge has.

See:

Matter of Petition of Argus Co., 138 N. Y. 557.
State v. *Lichtenberg*, 4 Wash. 553, 30 Pac. 659, 660 (1892).
Foley v. *Utterback*, 196 Ia. 956, 195 N. W. 721, 722 (1923).
People v. *Barbera*, 78 Cal. App. Rep. 277, 248 Pac. 304 (1926).
State v. *District Court of Lewis and Clark County*, 49 Mont. 158, 141 Pac. 151, 152 (1914).
Bradley v. *Van Nostrand*, 189 Cal. 457, 208 Pac. 690 (1922).

The appellants rely on *Case* v. *United States*, 14 Fed. (2d) 510 (C. C. A. 8th, 1926). In that case the Senior Circuit Judge resolved a disagreement between two District Judges by dividing the district and his action was ratified and approved by Congress. In practical effect, two districts were created, and the defendant was tried in one for an offense committed in the other.

POINT V.

The orders made by Judge Manton in the *Brake Shoe* suit were not subject to collateral attack.

We have shown under Point I that Judge Manton was a Judge *de jure*, empowered by statute to hold a District Court, having the jurisdiction to transact the particular business. But if there had been some informality or irregularity in his designation, litigants were not bound to require the Judge to establish his authority before submitting their business to him.

Judge Mack has been for considerable time holding a District Court in the Southern District of New York under a designation of the Chief Justice, but we have ascertained that his designation is not on file with the Clerk of the District Court and that it is not the practice to file such designations with the Clerk of the District Court. The

statute does not require it in the case of the designation of Circuit Judges (Sec. 22), as in the case of District Judges (Sec. 17).

When a litigant finds a Circuit Judge holding a District Court, he has a right to assume that he has been properly designated. He does not have to take the risk of any possible infirmity in the designation. And even though there be such infirmity, the judgments rendered are valid and free from collateral attack.

Ball v. *United States,* 140 U. S. 118 (1891).
McDowell v. *United States,* 159 U. S. 596 (1895).
Ex parte Henry Ward, 173 U. S. 452 (1899).

Flexibility has always been one of the great merits of the Federal judicial system. To preserve that flexibility, when the Circuit Courts were abolished, the Congress provided for the designation of Circuit Judges to hold District Courts, not on account of the absence, disability, disqualification or bias of a District Judge or because of the accumulation or urgency of business as in the case of the designation of District Judges, but whenever the Chief Justice, the Circuit Justice or the Senior Circuit Judge thinks it in the public interest to make such designation. While designations of District Judges made under Sections 17, 19 and 21 have to be in writing and filed with the clerk, there is no provision for filing a designation under Section 22 with the clerk and no provision even that it must be a formal written designation, thereby further demonstrating the policy of having the Circuit Judges easily and instantly available for District Court work.

Litigants do not have to concern themselves with matters of administration. When they find a Circuit Judge holding a District Court they have a right to present their business to such Court and do not take the hazard of some irregularity or some informality in the manner of the Judge's designation to hold it, and especially is that true when the Judge having the power to designate is himself holding the Court. That *ipso facto* would constitute a designation even without a formal written order, and our information is that

Senior Circuit Judges in various circuits have frequently, without the formality of a written designation, held District Courts.

The disregard of a rule of practice or of an arrangement for convenience among Judges does not go to the jurisdiction of the Court. Judge Manton, holding a District Court by designation, with all of the rights and powers and duties of a District Judge, had jurisdiction to hear the *Brake Shoe* suit. The parties could waive any irregularity in the mode or process by which the suit came before him. If there was such irregularity, timely objection should have been made in the suit, but both of the parties to it consented to his taking jurisdiction.

All parties in interest were accorded the right to be heard on the return of the order to show cause why the receivership should not be continued. The overruling of any proper objection or the refusal of any proper request, e. g., one to transfer the cause to another judge, could have been reviewed by the Circuit Court of Appeals on an appeal from the order of September 28, 1932. The petitioners say that they did not know that until the Circuit Court of Appeals had spoken in the instant case, but that was the settled practice in the Second and other Circuits as shown by Judge Learned Hand (R. 1033).

See:

Kingsport Press v. *Brief English Systems,* 54 Fed. (2d) 497 (C. C. A. 2d, 1913).

Christian v. *Hoe, Inc.,* 63 Fed. (2d) 218 (C. C. A. 2d).

Mitchell v. *Lay,* 48 Fed. (2d) 79, 84, 85 (C. C. A. 9th).

Pacific Northwest Packing Co. v. *Allen,* 109 Fed. 575 (C. C. A. 9th, 1901).

The petitioners say that they could not intervene without recognizing the propriety of the main proceeding, citing Equity Rule 37 and *United States* v. *California Canneries,* 279 U. S. 553, and other cases (Johnson Brief, p. 25; Boehm

Brief, p. 57). But they did not have to apply for intervention. If not technically cited, they at least had notice that they could appear and be heard.

Moreover, they have recognized the propriety of the main proceeding, for they themselves request the appointment of receivers for both companies. Judge Woolsey himself held that the District Court acquired and retained jurisdiction to appoint receivers perforce of the filing of the bill in the *Brake Shoe* case.

Petitioner Johnson appears to question the statement of Judge Learned Hand that "the dispute touches merely who shall be the receivers and who the judge to have charge of the receivership" (Johnson Brief, p. 3), but petitioner Boehm more frankly says, "Petitioners were not seeking a complete disruption of the receivership proceedings. Substantially, they sought only a removal of the proceedings to the proper district and an appointment of different and independent receivers" (Boehm Brief, p. 20). Said petitioner further says at page 26 of her brief:

> "Petitioners, however, were not challenging the propriety of the appointment of receivers for the Interborough. They were willing to concede that a receivership for the Interborough would be proper. What they were objecting to was the appointment of the particular receivers by the particular judge."

That relief was to be applied for in the suit itself. Likewise the charge that the suit was collusive, even if made as claimed in the *Johnson* suit, was one to be made in the suit itself and if sustained the Court is commanded by the statute to dismiss (Sec. 80, Title 28, U. S. Code). There is, and can be, no charge made in this case that the parties have been collusively made or joined for the purpose of creating a case cognizable by the Federal court.

Instead of adopting independent measures to enforce their individual and particular rights, intervenors representing all interests involved, not merely committees for security-holders, but trustees, and even the Manhattan Company itself and its bondholders and stockholders have submitted

those rights to a tribunal which they supposed, and were justified in supposing, was competent to deal equitably with all interests. If they were in error, if the supposed court was not a court at all but only an individual, the resulting prejudice will be their misfortune. But if the supposed court was a court *de jure* or *de facto*, their intervening rights are not to be prejudiced by some defect or irregularity in the mode of invoking the jurisdiction.

If Judge Manton was no more than a *de facto* Judge, his jurisdiction could not be attacked collaterally even in the *Brake Shoe* suit itself. Any irregularity in the exercise of the jurisdiction or in the manner in which jurisdiction was invoked might be reviewed in the suit itself, but could not be raised in a collateral suit.

Grant v. *Leach & Co.*, 280 U. S. 351.
Santiago v. *Nogueras*, 214 U. S. 260, 267, 268.
Cadle v. *Baker*, 20 Wall. 650.
Maxwell v. *Stewart*, 21 Wall. 71.

See also:

Ex parte American Steel Barrel Co., 230 U. S. 35, 45.

Petitioner Johnson invokes the well-settled rule that a *de facto* officer and a *de jure* officer cannot be acting in the same office at the same time (Johnson Brief, p. 35).

But said petitioner confuses, as indeed did Judge Woolsey, the office of judge and the jurisdiction of the judge with the places where the judge happens to be holding his court.

Judge Manton was in truth a *de jure* judge designated to hold a District Court with jurisdiction under the statute in law and equity. He certainly had color of authority to exercise all the rights, powers and duties of a District Judge, none the less so because other Judges had arranged among themselves that particular business should be transacted by the Judge who happened at the moment to be assigned to hold a particular part of the court.

Litigants would be in a sorry plight indeed if the adjudication of their rights could be set at naught in a collateral suit for some procedural defect or for the failure of a judge to observe even a proper agreement under the statute for the distribution of business of the court into parts.

POINT VI.

The petitioners' specifications of error do not refer to the reversal of Judge Woolsey's order consolidating the *Johnson* suit and the *Brake Shoe* suit. Said order was unauthorized, and in any case the two suits remained distinct despite it.

Judge Woolsey consolidated the two causes "on his own initiation against the objection and protest" of the parties to the *Brake Shoe* suit and the intervenors therein (R. 722, 723). His reason for doing so is frankly stated by him to arise from "a residuum of doubt whether, so long as they (the *Johnson* suit and the *Brake Shoe* suit) remain separate causes, an order could properly be made in the *Johnson* case, Equity No. 71-153, which would affect the receivership orders and the other orders made in the *American Brake Shoe & Foundry Company* case, Equity No. 70-364" (R. 710, 711). He did so in order that the complainants in the *Johnson* suit might "remain at large to challenge the jurisdiction of Judge Manton to make the orders" in the *Brake Shoe* suit (R. 711).

The power to consolidate actions is given by Section 734, Title 28 of the United States Code, as follows:

> "SEC. 734. *Orders to save costs; consolidation of causes of like nature.* When causes of a like nature or relative to the same question are pending before a court of the United States, * * * the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

The *Johnson* suit and the *Brake Shoe* suit were not "causes of a like nature or relative to the same question." The *Brake Shoe* suit was a suit by a creditor of the Interborough to marshal assets. The *Johnson* suit was a suit by a stockholder of Manhattan, on behalf of himself and other stockholders of the Manhattan, suing in a derivative capacity to have an accounting as between Manhattan and Interborough under the Manhattan lease. Instead of being of a like nature with the *Brake Shoe* suit, the *Johnson* suit was a collateral attack upon the entire proceeding in the *Brake Shoe* suit.

See:

Adler v. *Seaman,* 266 Fed. 828 (C. C. A. 8th, 1920), cert. denied 254 U. S. 635.

While Boehm, in her so-called supplemental complaint, sued as a contract creditor of the Interborough (R. 81), she obviously, as a mere intervenor in the *Johnson* suit, cannot, by a so-called "supplemental" bill, give a different character to that suit. So far as the supplemental bill of complaint of Boehm is concerned, it should be disregarded and ignored for lack of jurisdiction in the Court to entertain it. It was an obvious attempt by Boehm, a citizen of New York, to get into the Federal court in a suit against the Interborough, another citizen of New York, by first obtaining an intervention in the Manhattan stockholders' suit claiming, for the purposes of obtaining the intervention, to be a stockholder of Manhattan, and then utilizing the intervention obtained under that guise as a basis for a complaint made solely as a creditor of Interborough.

In view of the appointment of a Receiver for Manhattan in the *Brake Shoe* suit, any cause of action which Manhattan had against Interborough for an accounting would be enforceable only by the Receiver of Manhattan and therefore the derivative action which was instituted by Johnson could not properly proceed. This was the express ruling in *Mueller* v. *Adler,* 292 Fed. 138, the case dealing with the later history of *Adler* v. *Seaman,* 266 Fed. 828.

The statute requires that the consolidation must appear to be "reasonable." None of the parties requested this consolidation and it was against the interests of most of the parties that the same should be made. It certainly is not reasonable that against the protests of the parties to one suit it should be consolidated with another solely for the foreign and collateral purpose of enabling a stranger to the suit to acquire some kind of a status to collaterally attack the proceedings in the suit and to nullify all that had been done in the suit to date. It had the effect of forcing the parties to the *Brake Shoe* suit, in the language of Judge Hand in the Court below, "into a partnership to which they should not have been subjected" (R. 1035).

Moreover, despite the order of consolidation, the two suits remained distinct and independent, as petitioner Johnson concedes (Johnson brief, p. 70). The parties to the *Johnson* suit did not become parties to the *Brake Shoe* suit.

Consolidation is a mere mechanical convenience for carrying on two suits involving the same issues. It does not change the status of the parties or affect their rights. The parties and the issues in each suit remain the same as before consolidation.

Toledo etc. R. R. Co. v. *Continental Trust Co.*, 95 Fed. 497 (C. C. A. 6th, 1899).

Adler v. *Seaman*, 266 Fed. 828 (C. C. A. 8th, 1920); certiorari denied, 254 U. S. 655.

Taylor v. *Logan Trust Co.*, 289 Fed. 51 (C. C. A. 8th, 1923).

Vapor Car Heating Co. v. *Gold Car Heating & L. Co.*, 296 Fed. 201 (D. C., S. D. N. Y., 1923).

Nolte v. *Hudson Navigation Co.*, 11 Fed. (2d) 680, 682 (C. C. A. 2d, 1926).

Petitioner Johnson says that it was within the discretion of Judge Woolsey to consolidate the two actions (Johnson brief, p. 68). Even so, that discretion was reviewable by the Circuit Court of Appeals.

POINT VII.

The petitioners have no standing in an independent suit either to apply for the appointment of receivers of the Interborough or to attack the orders appointing such receivers.

Neither Johnson as a stockholder of the Manhattan Company, nor Boehm as a creditor of the Interborough, had any standing to obtain the appointment of receivers of the Interborough without its consent. At best, they were asserting contract claims.

Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491.

The claim of the Manhattan Company against the Interborough asserted by Johnson was even undetermined. *Johnson's* suit is for an accounting and he has not even yet established his right to that.

As a stockholder of the Manhattan Company, Johnson has no standing whatever either to apply for the appointment or to object to the appointment of receivers of the Interborough Company, and by her intervention in the *Johnson* suit, certainly Boehm acquired no rights except in her status as a stockholder of the Manhattan Company, on which she was granted intervention.

Petitioner Boehm is a resident of New York (R. 81). She applied for intervention in the *Johnson* suit on the theory that she was one of the class in whose behalf the suit was brought, i. e., was the owner of 1,400 shares of stock of the Manhattan Company (R. 139). That petition was filed on the same day that the *Johnson* bill was filed and on the consent of the complainant she was allowed to intervene (R.

138). That intervention, by consent, would have deprived the Court of jurisdiction (since the Court had no *res* in its possession) but for the fact that Boehm was allowed to intervene as a stockholder of the Manhattan Company.

Forest Oil Co. v. *Crawford*, 101 Fed. 849 (C. C. A. 3rd, 1900).

Gaddis v. *Junker*, 27 Fed. (2d) 156 (D. C., E. D. Texas, 1928).

However, in the "supplemental" bill of complaint which she filed in the *Johnson* suit, after intervention, she asserted rights only as the owner of Interborough bonds and notes (R. 81). Thereupon Johnson filed a supplemental bill in which he said that his suit was brought on behalf of "Manhattan and all stockholders similarly situated, including bondholders and all others financially interested in said company," and that petitions for intervention had been filed "by other stockholders and bondholders of the Manhattan and Interborough Companies" (R. 50). He, however, asserted no rights except as a stockholder of the Manhattan Company.

The Federal court would have had no jurisdiction of a suit brought by the petitioner Boehm as a bondholder or noteholder of the Interborough Company for there would have been no diversity of citizenship. She could not give the Federal court jurisdiction of her claims as a simple contract creditor of the Interborough by the device to which she resorted.

However, Boehm as a creditor of the Interborough and Johnson as a stockholder of the Manhattan asserting derivative rights in its behalf were accorded the right to be heard in the *Brake Shoe* suit by the order appointing receivers.

POINT VIII.

The question as to the power of the Court to appoint receivers at the suit of a simple contract creditor on the consent of the defendant and the question as to whether the *Brake Shoe* suit was collusive are separate and distinct questions. Neither is presented by the record.

The Johnson bill of complaint did not so much as charge that the plaintiff in the *Brake Shoe* suit was a simple contract creditor. It merely alleged that Receivers of the Interborough were appointed on August 26, 1932, on a bill filed in the office of the Clerk (R. 14, fol. 41).

The *Johnson* complaint did not contain any allegation that the proceeding was collusive, or allege any facts whatsoever from which collusion might be inferred. It did allege that it was important to have independent Receivers, disconnected with the old management (R. 24, fol. 70), that one of the Receivers was associated with the designated attorneys for the Receivers and that that firm of attorneys or certain members of it had been associated with the Brooklyn-Manhattan Transit Company, which owned shares of the Interborough (R. 24, fols. 71-72), that the appointment of the Receiver of the Manhattan Railway Company was sponsored by the Brooklyn-Manhattan Transit Company-Interborough interests, and that there was need of an independent Receiver (R. 25, fols. 75-76), that there were common directors of the Interborough and the Manhattan (R. 31, fol. 91), that there was great danger that trustees or bondholders would set aside the receiverships and obtain the appointment of Receivers in the State courts, which would result in "hopeless confusion and chaos" and "injury, damage and inconvenience to the travelling public" (R. 37, fol. 109).

The unsupported and unwarranted contention now made that the *Brake Shoe* suit was started with the ulterior object of bringing about an unjustifiable disaffirmance of the Man-

hattan lease is negatived in the *Johnson* bill of complaint. The concluding allegation of that complaint, before the prayers, states (R. 42, fol. 125):

> "Indeed the mounting losses of Interborough from the operation of the elevated division including the Manhattan lines, make his (Mr. Hedley's) statements most significant at the present time now that Interborough and Manhattan are in need of receivership. Interborough's receivers are in duty bound to protect its security holders and stockholders from further heavy losses. Interborough can in all probability be saved from further loss by the disaffirmance of the lease. There is, therefore, in view of the premises an imperative, urgent and immediate need of an independent and proper receiver and/or receivers being appointed to protect the interests of Manhattan."

See also paragraph 41 of the *Johnson* bill (R. 40) and paragraph IX of the supplemental bill (R. 57).

The theory of the *Johnson* bill was that the immediate appointment of Receivers was imperative, that Judge Manton's orders were void for the violation of Rules 1-a and 11-a, wherefore the Court should appoint independent Receivers in the *Johnson* suit to prevent chaos and irreparable injury and damage.

The trustees and committees for bondholders whom the complainant feared would institute foreclosures and have Receivers appointed in the State courts have intervened in the *Brake Shoe* suit and are supporting the receiverships, as stated in the preliminary statement of facts. Even if the *Johnson* bill had charged that the proceedings were collusive, that, and the question of the propriety of appointing Receivers at the suit of a simple contract creditor consented to by the defendant, were questions to be raised in the *Brake Shoe* suit itself, not in a collateral suit. The only basis for a collateral suit, if otherwise well brought, would have been the nullity of the proceedings in the *Brake Shoe* suit, and indeed that was the sole basis of the *Johnson* suit. Receivers had been appointed, so it was alleged, by orders that were absolutely null and void, wherefore and because of the

urgency of the immediate appointment of Receivers it was necessary for the Court to intervene and, by the appointment of Receivers by a valid order, prevent chaos and irreparable injury.

The defendant in the *Brake Shoe* suit could not deny the facts, asserted by the appellants themselves, which showed that the appointment of Receivers was urgent and imperative. It was compelled by the facts to admit the allegations of the bill and its Board of Directors, knowing that it could not provide for the payment of large amounts shortly maturing (R. 160), would have been remiss in their duty under the conceded facts not to have consented to the immediate appointment of receivers. Thereby the defendant waived the point that the plaintiff had not exhausted its remedies, which point was successfully made by the defendant in *Pusey & J. Co.* v. *Hanssen* (261 U. S. 491).

This was not the case of a receivership for the conservation of the assets of a *solvent* corporation, as was the case of *Michigan* v. *Michigan Trust Co.* (286 U. S. 334). But the Court did not hold even in that case that the District Court was without jurisdiction to appoint Receivers on the bill of a simple contract creditor consented to by the defendant. What the Court said was that such receiverships were to be "watched with jealous eyes lest their function be perverted." The place for that watchfulness was in the very action in which the Receivers were appointed. The order appointing temporary Receivers in the *Brake Shoe* suit expressly invited creditors and other parties in interest to appear and be heard (R. 184). They were not even put to the necessity of moving for intervention. "Any other creditor" or "other party in interest" could have been heard and there or upon appeal could have secured redress for any abuse or misuse of the process of the Court. But the conceded fact is that there has been no such abuse, and the sole ground of attack is that the Court was without jurisdiction.

In *Harkin* v. *Brundage*, 276 U. S. 36, relied upon by the petitioners, the jurisdiction of the District Court to appoint Receivers was necessarily recognized, since condi-

tions were imposed upon the turning over of the property to the State court which had first acquired jurisdiction.

The receivership in the instant case was not designed to forestall *the normal process of administration in bankruptcy* or to conserve the assets of a solvent company or to enable "a tottering business to continue while creditors are held at bay" or improperly to defeat the jurisdiction of a State court. *Upon the conceded facts*, a receivership was imperative to prevent dismemberment of a great property devoted to the public use and to effect a reorganization just and equitable to all interests.

For the defendant, under the circumstances, to insist that the plaintiff should first exhaust its legal remedies, as it had a right to do, would have invited irreparable injury to those whom it owed a duty to protect. It was not obliged to hold its assets as a prize to the swift in the race of creditors to secure liens, and had any "other creditor" or "other party in interest" made timely objection on the return of the order to show cause, such objection should have been overruled in the interest of fairness and equity to all.

An equity receivership is the only practical way to prevent dismemberment and destruction of a great railway property like the Interborough. Bankruptcy was not available. No other remedy was adequate. Sequestration at the suit of a judgment-creditor with execution returned unsatisfied under Section 70 *et seq.* of the General Corporation Law of New York or dissolution under Section 100 *et seq.* of said statute are destructive remedies not suited to the case of a great public service corporation.

The Court not only had jurisdiction but, upon the conceded facts, it properly exercised its jurisdiction to appoint Receivers. The trustees under the First and Refunding Mortgage of the Interborough and of the Consolidated Mortgage of the Manhattan Railway Company and responsible committees representing the different classes of bondholders and noteholders have not sought the destructive remedies in the State courts apprehended by the petitioners, but have submitted their rights to a court of equity which can prevent

dismemberment of the property, maintain the public use and protect the rights of all. Their course should not be suffered by a court of equity to result to their prejudice at the instance of those palpably seeking to promote special and particular interests.

This Court has but recently reaffirmed the jurisdiction of the Federal courts to appoint Receivers at the suit of a simple contract creditor if the defendant consent to the decree.

Shapiro v. *Wilgus*, 287 U. S. 348, 356.

In every case in which the subject has been considered by this Court the jurisdiction has either been assumed or necessarily decided. The warnings of this Court have been directed not to the legitimate exercise of the jurisdiction but to the abuse of it, to the improper hindrance and delay of creditors.

Re Metropolitan Ry. Receivership, 208 U. S. 90.
Pusey & J. Co. v. *Hanssen*, 261 U. S. 491.
United States v. *Butterworth-Judson Corp.*, 269 U. S. 504.
Harkin v. *Brundage*, 276 U. S. 36.

The petitioners do not complain of the fact that the Court exercised its jurisdiction to appoint Receivers. They themselves asked for the appointment of Receivers and asserted the urgency and indeed the imperative necessity of such appointment. Indeed, it was only after Judge Manton's refusal to appoint the Receivers requested by them (*supra*, pp. 9, 10) that they attacked the jurisdiction which they themselves had invoked.

As pointed out in Point VII above, both Johnson and Boehm have, at very best, only the position of simple contract creditors, seeking a receivership in the *Johnson* suit and their belated complaint that the Brake Shoe Company is only a simple contract creditor is, to say the least, slightly inconsistent.

Certain propositions are so well settled by the decisions of this Court that the bare statement of them suffices.

The objection that a party seeking equitable relief has not exhausted his legal remedies may be waived.

Re Metropolitan Ry. Receivership, 208 U. S. 90, 110.
McGowan v. *Parish,* 237 U. S. 285, 295.
Hollins v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, 380.
Brown v. *Lake Superior Iron Co.,* 134 U. S. 530.
Price v. *United States,* 269 U. S. 492.
Stripe v. *United States, id.,* 503.
United States v. *Butterworth-Judson Corp., id.,* 504.

Where the complainant is a *bona fide* owner of the claim sued on and there is the requisite diversity of citizenship, the motives for seeking Federal jurisdiction are immaterial.

Blair v. *City of Chicago,* 201 U. S. 400, 448.
Dickerman v. *Northern Trust Co.,* 176 U. S. 181.
Black & W. T. & T. Co. v. *Brown & Y. T. & T. Co.,* 276 U. S. 518.

The co-operation of the defendant does not make the suit collusive or prevent it from being a justiciable controversy.

Re Metropolitan Ry. Receivership, 208 U. S. 90.
Brown, Bonnell & Co. v. *Lake Superior Iron Co.,* 134 U. S. 530, 534.
Black & W. T. & T. Co. v. *Brown & Y. T. & T. Co.,* 276 U. S. 518.
United States v. *Butterworth-Judson Corp.,* 269 U. S. 504.

See:

Hefner v. *Northwestern Life Ins. Co.,* 123 U. S. 747, 756.

POINT IX.

The *Johnson* suit was not a direct attack.

In this Court, for the first time, the petitioners are now claiming that the *Johnson* suit is not a collateral attack (Johnson brief, p. 53).

Petitioner Boehm likens it to a suit to set aside a judgment or decree for fraud (Boehm brief, p. 21).

But no charge of fraud was either preferred or tried before Judge Woolsey.

We say that no charge that the *Brake Shoe* suit was collusive was even made in the *Johnson* bill. At most, evidence was pleaded from which the Court is now asked to infer a charge not pleaded.

But answers to the Johnson bill had not yet been filed when the motions were made before Judge Woolsey. The issues had not been joined, let alone tried. Upon the proceedings in the *Brake Shoe* suit and the bills and supplemental bills and petitions in the *Johnson* suit, without the trial of any issue and before even the joinder of issue, Judge Woolsey set aside all of the orders in the *Brake Shoe* suit as *coram non judice* solely and only because Judge Manton had entertained jurisdiction despite Rules 1-a and 11-a and had thereby become, as Judge Woolsey held, an "intruder," an "usurper," a mere individual without even the color of judicial authority.

If that decision be sound, it may be assumed that Judge Manton's orders could be attacked collaterally or even ignored in another suit, but if unsound this record presents no question for review by this Court.

POINT X.

The rights of the intervenors have become paramount.

The interests of the original parties to the suit are now subordinate to those of the intervenors, including the Manhattan Company itself, its bondholders, its mortgage trustees and its stockholders. The matter of paramount importance and public interest is the protection of those interests, which have been submitted to the court in the *Brake Shoe* suit, in which receiverships of great and complicated interests have now been administered for eight months in both the Eastern and Southern Districts of New York. Surely, the vast inter-

ests of the intervenors are not to be put in jeopardy by a dispute between judges over matters of administration or calendar practice.

* * *

If the orders of Judge Manton were "*coram non judice*" and "wholly void and of no juridical effect," the consequences are inescapable, however disastrous that may be to the complicated interests involved in a receivership which has now been administered for eight months in two districts.

But counsel for petitioner Boehm, who signed the *Johnson* bill as "of counsel," appears to appreciate that that extreme position is untenable, and so he appeals to the "broad supervisory power" of this Court to correct what he claims was an irregular and improper exercise of jurisdiction. Realizing the serious consequences of the extreme position of his colleague, he suggests that a reversal be accompanied by a condition "that all proper acts of the receivership which it would be unjust to undo, be validated."

Through the Boehm intervention, the complainant's counsel in the *Johnson* suit have been able to file separate briefs, nominally for different parties, and thus to present divergent views and to becloud the real issues with much irrelevant matter. But the two positions taken by them are mutually destructive. Entire absence of jurisdiction is one thing; irregularity or even impropriety in the exercise of jurisdiction a totally different thing. One negatives the other.

If the questions raised in this case touch only the manner of the exercise of jurisdiction, they certainly cannot be raised in a collateral suit and there is plainly nothing for this Court to review.

If they touch merely the authority of Judge Manton to hold a District Court, with all the rights and powers and duties of a District Judge, they could not be raised collaterally even in the *Brake Shoe* suit itself.

The sole question before the Court is whether Judge Manton had jurisdiction of the *Brake Shoe* suit.

Wherefore we have not thought it necessary or fitting to consider the irrelevancies injected into the case by methods which seem to characterize the efforts of those pursuing ulterior aims.

If Judge Manton had jurisdiction of the *Brake Shoe* suit, the rights of the intervenors have become of paramount importance. They are not to be prejudiced or put in jeopardy by attacks in a collateral suit by strangers to the *Brake Shoe* suit.

IN CONCLUSION.

POINT XI.

The decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

NATHAN L. MILLER,
Counsel for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of the Interborough Rapid Transit Company, Respondents.

NATHAN L. MILLER,
WILLIAM W. MILLER,
CARL M. OWEN,
HAROLD J. GALLAGHER,
of Counsel.

On behalf of the respondent Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of Interborough Rapid Transit Company, the undersigned joins in the foregoing brief and submits that the decree of the Circuit Court of Appeals should be affirmed.

CLOYD LAPORTE,
Counsel for respondent Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of Interborough Rapid Transit Company.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 711 AND No. 721.

BENJAMIN F. JOHNSON,
Petitioner,

against

MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER

OF THE

INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

Sirs:

TAKE NOTICE that the within is a copy of a "List of 84 Opinions Reported in the Federal Reporter, which were written in Cases heard by the Senior Circuit Judge Holding

a District Court," which the undersigned will ask leave to present to the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States, for the information of the Court.

Dated, New York, N. Y., April 28, 1933.

NATHAN L. MILLER,
Counsel for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, Respondents.

To:

CHARLES FRANKLIN, Esq.,
Counsel for Petitioner Benjamin F. Johnson.

LOUIS BOEHM, Esq.,
Counsel for Petitioner Lillian Boehm.

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LIST OF 84 OPINIONS REPORTED IN THE FEDERAL REPORTER, WHICH WERE WRITTEN IN CASES HEARD BY THE SENIOR CIRCUIT JUDGE HOLDING A DISTRICT COURT.

An analysis shows that, of the 84 opinions in the following list, 17 were written in the First Circuit, 51 in the Second,

3 in the Third, 2 in the Fourth, 6 in the Seventh and 5 in the Eighth. There is appended hereto (pp. 13 *et seq.*) a copy of an order of Senior Circuit Judge Sanborn, made while he was holding a District Court in the Eighth Circuit, appointing Receivers for the St. Louis and San Francisco Railroad Company.

193 Fed. Rep.

page 286 Penn Steel Co. v. New York City Railway Co.

Central Trust Co. v. Third Avenue R'way Co. (4 cases). LACOMBE, S. C. J., 2nd.

194 Fed. Rep.

page 448 Weed Chain Grip Co. v. Atlas Chain Co. LACOMBE, S. C. J., 2nd.

543 Pennsylvania Steel Co. v. N. Y. City Ry. Co. LACOMBE, S. C. J., 2nd.

546 Pennsylvania Steel Co. v. N. Y. City Ry. Co. LACOMBE, S. C. J., 2nd.

893 National El. Sig. Co. v. Telefunken Wireless, et al. LACOMBE, S. C. J., 2nd.

195 Fed. Rep.

page 84 Brown & Sharp Mfg. Co. v. Coates Clipper Co. COLT, S. C. J., 1st.

96 Carpenter v. Knollwood Cemetery, et al. COLT, S. C. J., 1st.

173 New York Times v. Sun Printing & Publishing Co. LACOMBE, S. C. J., 2nd.

299 In re Steiner. LACOMBE, S. C. J., 2nd.

614 Penn. Steel Co. v. N. Y. City Ry. Co. LACOMBE, S. C. J., 2nd.

196 Fed. Rep.

page 215 Parsons Non-Skid Co. v. Asch. LACOMBE, S. C. J., 2nd.

661 Pennsylvania Steel Co. v. N. Y. City Ry. Co. (several cases). LACOMBE, S. C. J., 2nd.

198 Fed. Rep.

page 297 Carpenter v. Knollwood Cemetery. COLT, S. C. J., 1st.

355 United States v. Hankey. COLT, S. C. J., 1st.

959 A. Stein & Co. v. Liberty Garter Mfg. Co. LACOMBE, S. C. J., 2nd.

199 Fed. Rep.

page 189 Browning Hook & Eye Co. v. Tri-Eye Hook & Eye Co. LACOMBE, S. C. J., 2nd.

440 Perfection Cooler Co. v. Cordley. COLT, S. C. J., 1st.

200 Fed. Rep.

page 107 Coca-Cola Co. v. American Druggists Syndicate, et al. Trade-mark injunction. LACOMBE, S. C. J., 2nd.

312 Pennsylvania Steel Co., et al. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

201 Fed. Rep.

page 418 Pennsylvania Steel Co., et al. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

781 Pennsylvania Steel Co., et al. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

202 Fed. Rep.

page 296 Pennsylvania Steel Co., et al. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

598 Cilley v. United Shoe Machinery Co. COLT, S. C. J., 1st.

602 Strout v. United Shoe Machinery Co. COLT, S. C. J., 1st.

607 Penn. Steel Co. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

803 U. S. v. Nipissing Mines Co. Tariff Act. LACOMBE, S. C. J., 2nd.

203 Fed. Rep.

page 292 U. S. ex rel. Schleiter v. Williams. Immigration Act. LACOMBE, S. C. J., 2nd.

521 Continental Securities Co. v. Interborough R. T. Co., et al. Injunction. LACOMBE, S. C. J., 2nd.

1021 Patterson v. Bucknall S. S. Lines, Limited. LACOMBE, S. C. J., 2nd.

204 Fed. Rep.

page 136 Penn. Steel Co., et al. v. N. Y. City Ry. Co., et al. Receivership. LACOMBE, S. C. J., 2nd.

844 U. S. ex rel. Aronowicz v. Williams. Deportation of Aliens. LACOMBE, S. C. J., 2nd.

846 U. S. ex rel. Goncaloes, et al. v. Williams. Deportation of Aliens. LACOMBE, S. C. J., 2nd.

847 U. S. ex rel. Kutas v. Williams. Deportation of Aliens. LACOMBE, S. C. J., 2nd.

848 U. S. ex rel. La Fata v. Williams. Deportation. LACOMBE, S. C. J., 2nd.

208 Fed. Rep.

page 168 Penn. Steel Co. v. New York City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

205 Sperry & Hutchinson Co. v. Associated Merchants Stamp Co. Injunction. LACOMBE, S. C. J., 2nd.

419 Vacuum Cleaner Co. v. Am. Rotary Valve Co. Patents. LACOMBE, S. C. J., 2nd.

747 Penn. Steel Co. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

757 Penn. Steel Co., et al. v. N. Y. City Ry. Co., et al., in re Second Ave. Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

777 Penn. Steel Co., et al. v. N. Y. City Ry. Co. in re Central Park Co. Receivership. LACOMBE, S. C. J., 2nd.

209 Fed. Rep. page 495 — Notaseme Hosiery Co. v. Straus, et al. Trademarks. LACOMBE, S. C. J., 2nd.

211 Fed. Rep. page 236 — U. S. ex rel. Gegiow, et al. v. Uhl. Alien Deportation. LACOMBE, S. C. J., 2nd.

212 Fed. Rep. page 958 — Imperial Machine Co. v. Jacobus. Patents. LACOMBE, S. C. J., 2nd.

217 Fed. Rep. page 66 — Asbestos Shingle, Slate & Sheathing Co. v. Rock Fibre Mfg. Co. BAKER, S. C. J., 7th.

423 — Penn. Steel Co. v. N. Y. City Ry. Co. LACOMBE, S. C. J., 2nd.

219 Fed. Rep. page 939 — Penn. Steel Co. v. N. Y. City Ry. Co. LACOMBE, S. C. J., 2nd.

220 Fed. Rep. page 541 — U. S. v. Sisson. Deportation. LACOMBE, S. C. J., 2nd.

221 Fed. Rep. page 440 — Penn. Steel Co. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

222 Fed. Rep. page 96 — U. S. ex rel. Schlimm v. Howe. Deportation Case. LACOMBE, S. C. J., 2nd.

693 — U. S. v. Sisson. Deportation. LACOMBE, S. C. J., 2nd.

223 Fed. Rep. page 809 — U. S. v. Moy You. Deportation. LACOMBE, S. C. J., 2nd.

224 Fed. Rep. page 520 — U. S. v. Moy Toom. Deportation. LACOMBE, S. C. J., 2nd.

225 Fed. Rep.
page 96 Penn. Steel Co. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.
106 Penn. Steel Co. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

226 Fed. Rep.
page 359 Bowker v. Donnell. Negligence. LACOMBE, S. C. J., 2nd.
990 Stevenson v. Fox. Patents. LACOMBE, S. C. J., 2nd.

228 Fed. Rep.
page 392 Postal T. & C. Co. v. Ingraham. PUTNAM, S. C. J., 1st.

229 Fed. Rep.
page 465 Penn. Steel Co. v. N. Y. City Ry. Co. LACOMBE, S. C. J., 2nd.

241 Fed. Rep.
page 943 The Leslie. Admiralty. BUFFINGTON, S. C. J., 3rd.

246 Fed. Rep.
page 260 North American Co. v. St. Louis & S. F. R. R. Co. SANBORN, S. C. J., 8th.*

247 Fed. Rep.
page 620 Ingersoll, et al. v. Doyle, et al. Trade-mark. DODGE, S. C. J., 1st.

253 Fed. Rep.
page 63 U. T. S. Rubber Co. v. Panther Rubber Co. DODGE, S. C. J., 1st.

255 Fed. Rep.
page 129 Hiram Walker & Sons, Ltd. v. Corning & Co. BAKER, S. C. J., 7th.

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* A copy of the order appointing the receivers of the St. Louis & S. F. R. R. Co. in the United States District Court for the Eastern District of Missouri, dated May 27, 1913, signed by Senior Circuit Judge Walter H. Sanborn, is appended hereto. In this connection, see *St. Louis & S. F. R. R. Co.* v. *Spiller*, 274 U. S. 304.

259 Fed. Rep. page 913 — Novitzky v. Rozner. Jurisdiction. BUFFINGTON, S. C. J., 3rd.

264 Fed. Rep. page 247 — Supreme Tribe of Ben Hur v. Cauble. Injunction. BAKER, S. C. J., 7th.

265 Fed. Rep. page 805 — Kuhnhold v. Deutsch-Austalische Dampfschiffs Gesellschaft. Admiralty. WARD, S. C. J., 2nd.

267 Fed. Rep. page 733 — Aktieselskabet Fido v. Lloyd Brazileiro. Admiralty. WARD, S. C. J., 2nd.

270 Fed. Rep. page 229 — Mayer v. Garvan. Trading With the Enemy Act. BINGHAM, S. C. J., 1st.

272 Fed. Rep. page 699 — Long v. Union Trust Co. BAKER, S. C. J., 7th.

275 Fed. Rep. page 206 — William H. Haskell Mfg. Co. v. Nelson Blower & Furnace Co. BINGHAM, S. C. J., 1st.

278 Fed. Rep. page 945 — Anderson Coal Co. v. Waban Rose Conservatories. BINGHAM, S. C. J., 1st.

285 Rep. Rep. page 791 — Pittsburgh Coal Washer Co. v. Slag Rock Mach. Co. Patents. BUFFINGTON, S. C. J., 3rd.

288 Fed. Rep. page 612 — N. A. Co. v. St. Louis & S. F. R. Co. Receivership. SANBORN, S. C. J., 8th.

292 Fed. Rep. page 511 — U. S. v. New England Fish Exchange, et al. Monopolies. BINGHAM, S. C. J., 1st.

3 Fed. 2nd page 34 — Henrici Co. v. Reinecke (Dec., 1924, N. D. Ill.). Taxes. ALSCHULER, S. C. J., 7th.

9 Fed. 2nd page 980 — Rosemary (Feb., 1925, E. D. Va.). Admiralty. WADDILL, S. C. J., 4th.

10 Fed. 2nd 372 — Whittaker v. Biddle (Jan., 1926, Kan. Dist.). Criminal. SANBORN, S. C. J., 8th.

11 Fed. 2nd page 156 — Va. Shipbuilding Corp. v. U. S. Shipping Board Emergency Fleet Corp'n (Mar., 1925, E. D. Va.). Accounting Admiralty. WADDILL, S. C. J., 4th.

14 Fed. 2nd page 679 — U. S. ex rel. Johanson v. Phelps (Aug., 1926, Vt. Dist.). Immigration. HOUGH, S. C. J., 2nd.

25 Fed. 2nd page 180 — I. T. S. Rubber Co. v. Essex Rubber Co. (Dec., 1922, Mass. Dist.). Patent. BINGHAM, S. C. J., 1st.

28 Fed. 2nd page 174 — North American Co. v. St. Louis & S. F. R. R. Co. (May, 1926, E. D. Mo.). Reorganization. W. H. SANBORN, S. C. J., 8th.

176 — Cent. Union Trust Co. v. M. K. & T. Ry. Co. (Feb., 1923, E. D. Mo.). Reorganization. W. H. SANBORN, S. C. J., 8th.

37 Fed. 2nd page 730 — Huntington Mfg. Co. v. Bradford (June, 1915, Mass. Dist.). Process question. DODGE, S. C. J., 1st.

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Respectfully submitted,

NATHAN L. MILLER,
Counsel for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, Respondents.

APPENDIX.

IN THE

DISTRICT COURT OF THE UNITED STATES,

WITHIN AND FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI.

NORTH AMERICAN COMPANY,
Complainant,

vs.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
Defendant.

ORDER.

On reading and considering the verified bill of complaint in this cause and on motion of counsel for the complainant, and the defendant, the St. Louis and San Francisco Railroad Company, appearing by its counsel and assenting thereto and upon due deliberation, it is ordered, adjudged and decreed as follows:

(1) That the said bill and answer be filed and the prayer of the bill for the appointment of a receiver or receivers in this cause be and the same is hereby granted.

(2) That Thomas H. West and Benjamin L. Winchell be and they are hereby appointed Receivers and invested with the powers of receivers in equity of all the franchises, liens, claims, rights, interests and property of every name and nature either at law or in equity and wherever situated, of the St. Louis and San Francisco Railroad Company, and they

are hereby authorized and directed forthwith to take possession thereof, to preserve, manage, operate and use the same, to run and operate the railroads now held by said Company by lease or otherwise and to conduct the business of said Company according to law and in accordance with the principles, rules and practice in equity in cases of this character. They are authorized to apply to any other court or courts in this Circuit or any other Circuit for ancillary orders to assist them in the exercise of their powers and the discharge of their duties. They are authorized and directed to collect all moneys due and all moneys to become due to said Company, to institute and prosecute such suits in their own names as Receivers or in the name of the Company, as their attorney may advise, to defend such suits as may be brought against them and those now pending or hereafter brought against the Company which affect or may affect the property of which they now are or may become Receivers. They are also authorized with the advice of their attorney to compromise and settle the amounts owing from one party to the other in suits between them and third parties and between the Company and third parties in ordinary cases arising out of the common operation of the Railroad.

(3) Out of the moneys coming to their hands they are authorized to pay, (1) the necessary expenses of operating the railroads and conducting the business during their receivership; (2) the taxes on the property; (3) the following claims incurred within six months preceding the date of this order, the wages and salaries of employes of the Company, the traffic and car mileage balances and accounts for car and equipment repairs.

(4) It is hereby ordered that all persons, firms and corporations in possession of any of the property of which the Receivers are hereby appointed forthwith deliver the same to them or to their representatives or agents.

(5) The Railroad Company and the officers, directors, agents, attorneys and employes thereof, and all other persons claiming to act by virtue of or under said Railroad Company, and all other persons, firms and corporations what-

soever and wheresoever situated, located or domiciled, are hereby restrained and enjoined from interfering with, attaching, levying upon or in any manner whatsoever disturbing any portion of the properties and premises of which Receivers are hereby appointed, or from taking possession of or in any manner interfering with the same or any part thereof, or from interfering in any manner or preventing the discharge by said Receivers of their duties or the operation of said properties and the premises under the order of this Court.

(6) The Receivers shall keep accurate accounts of their receipts and disbursements, take proper vouchers for their disbursements and file with the special master complete bimonthly reports of their receipts and disbursements with the accompanying vouchers. They shall file with him an inventory of the properties coming into their possession as soon as they can conveniently prepare it.

(7) Within ten days from this date each of the said Receivers shall execute a bond with one or more sureties approved by this Court or one of the Judges thereof, in the sum of $100,000 for the benefit of whom it may concern, conditioned that they will well and truly perform the duties of their offices and account for all moneys and properties which may come to their hands and abide by and perform all things which they shall be directed by the Court to do and shall file this bond with the clerk of this Court.

(8) The complainant herein as well as the Receiver may apply to any other Court of competent jurisdiction for such order or orders in the premises as it may deem necessary in aid of the orders issued by this Court.

WALTER H. SANBORN,
Circuit Judge.

Filed May 27, 1913,

W. W. NALL,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 711 AND No. 721.

BENJAMIN F. JOHNSON,
Petitioner,

against

MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
OF THE
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

Sirs:

TAKE NOTICE that the within is a copy of "Communications received from the Senior Circuit Judges in answer to an inquiry, as to their practice in designating themselves to hold District Courts, made by Judge Manton after the opinion of the District Court herein was handed down," which, to-

gether with the originals of said communications, the undersigned will ask leave to present to the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States, for the information of the Court.

Dated, New York, N. Y., April 28, 1933.

NATHAN L. MILLER,
Counsel for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, Respondents.

To:

CHARLES FRANKLIN, Esq.,
Counsel for Petitioner Benjamin F. Johnson.

LOUIS BOEHM, Esq.,
Counsel for Petitioner Lillian Boehm.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1932.

No. 711 AND No. 721.

BENJAMIN F. JOHNSON,
Petitioner,

against

MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
OF THE
INTERBOROUGH-MANHATTAN RECEIVERSHIP
PROCEEDINGS.

COPIES OF COMMUNICATIONS FROM THE SENIOR CIRCUIT JUDGES IN ANSWER TO AN INQUIRY, AS TO THEIR PRACTICE IN DESIGNATING THEMSELVES TO HOLD DISTRICT COURTS, MADE BY JUDGE MANTON AFTER THE OPINION OF THE DISTRICT COURT HEREIN WAS HANDED DOWN.

WESTERN UNION

1932 OCT 15 AM 10 02

BA90 19—MANCHESTER NHAMP 15 946 A
JUDGE MARTIN MANTON—

ANSWER DATE FEDERAL BLDG NYK—
TELEGRAM RECEIVED IT HAS BEEN THE PRACTICE IN THIS CIRCUIT I HAVE REPEATEDLY DONT SO AS HAVE MY PREDECESSORS

GEORGE H BINGHAM

UNITED STATES CIRCUIT COURT OF APPEALS

THIRD JUDICIAL CIRCUIT

Philadelphia

Chambers of
JUDGE BUFFINGTON

October 18, 1932.

Hon. Martin T. Manton,
U. S. Circuit Judge,
New York City.

My dear Judge Manton:

Your telegram sent to Pittsburgh was delayed in reaching me.

Answering your inquiry I beg to advise you that in cases where there has been no district judge to act and the public interest requires, I have, on occasion, designated myself to sit in a district court. I have no knowledge what my predecessors did in that respect.

Trusting the delay in replying to your telegram has not caused you any inconvenience, I am

Very cordially yours,

JOSEPH BUFFINGTON,
Per E. P.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH JUDICIAL CIRCUIT

Chambers of
JOHN J. PARKER
U. S. Circuit Judge
Richmond, Va.

October 24, 1932.

Hon. Martin T. Manton,
United States Circuit Judge,
Federal Building,
New York City, N. Y.

My dear Judge Manton:

I have just received your night letter which was sent to me under date of October 14th. I was delayed in receiving it by reason of the fact that I have been absent from Charlotte ever since September 27th and have had no one in my office. The Telegraph Company simply delivered the telegram to my office and I knew nothing about it. I have had my mail forwarded here by the mail carrier in the Federal Building, but he does not enter my office and probably did not know that there was a telegram there for me. My law clerk returned to Charlotte Saturday and found the telegram and sent it to me at once. I am answering immediately upon receiving it, but am writing instead of telegraphing because I feel sure that so much time has elapsed that a telegram would not be of any special benefit and a letter can cover the points more fully.

I will say in answer to your telegram that in this Circuit the custom is for the Senior Circuit Judge to assign himself for work in the District Courts whenever in his opinion the public interest so requires. Senior Circuit Judges Pritchard, Woods and Waddill assigned themselves many times. I have had occasion to assign myself only once. I am asking the Clerk of our Court to write you giving a list of the designations made by the Senior Circuit Judges in which they have assigned themselves for work in the District Court.

In talking with the Clerk of our Court, Mr. Claude M. Dean, with regard to the matter, he tells me that at the time Judge Woods became Senior Judge of this Circuit a question

arose as to his power to designate himself to act as District Judge and that he took the matter up by correspondence with the Chief Justice. Mr. Dean thinks that the Chief Justice at the time was Chief Justice White, although it may have been Chief Justice Taft. The Chief Justice advised him that there was no necessity for bothering the Chief Justice with requests to designate him to sit in the District Court, but that he should proceed to designate himself whenever in his opinion such designation was proper. I know that since my appointment to the bench Judge Waddill has designated himself a number of times to hold courts in the Eastern and Western Districts of Virginia. I succeeded Judge Waddill as Senior Judge of the Circuit, but I have had occasion to designate myself only once. Last year Judge Webb was in the midst of an important trial at Asheville when his Shelby term was scheduled to open. I designated myself as District Judge for the Western District of North Carolina and proceeded to Shelby and opened the court.

As indicated above, I have asked the Clerk to send you a list of the designations which the Senior Circuit Judges have made, and you will doubtless receive same at an early date. I am very sorry indeed that I did not receive your telegram promptly, and you can rest assured that had I done so you would have received a prompt answer.

If there is any further information I can give you with respect to the matter, I shall be glad to do so.

With kindest regards, I am

Sincerely yours,

JJP/B JOHN J. PARKER.

CLERK'S OFFICE

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

Richmond, Virginia,
October 24, 1932.

Hon. Martin T. Manton,
U. S. Circuit Judge,
New York, N. Y.

My dear Judge:

At the direction of Senior Circuit Judge Parker, I have prepared and herewith enclose, statement showing designations by Senior Circuit Judges, designating themselves to hold District Courts in the Fourth Circuit. According to my records, this is a complete list of all such designations in this circuit.

With high personal esteem, I am,

Respectfully,

CLAUDE M. DEAN,
Clerk.

DtoW.
Enclosure.

STATEMENT ENCLOSED BY CLAUDE M. DEAN, CLERK, U. S. CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

DESIGNATIONS OF SENIOR CIRCUIT JUDGES, BY THEMSELVES, TO HOLD DISTRICT COURTS.

Apr. 7, 1925 Senior Circuit Judge Woods designated self to hold District Court at Norfolk, Va.

May 4, 1925 Senior Circuit Judge Woods designated self to hold District Court at Roanoke, Va.

July 31, 1925	Senior Circuit Judge Waddill designated self to hold District Court for Eastern District of North Carolina.
Feb. 23, 1926	Senior Circuit Judge Waddill designated self to hold District Court at Norfolk, Va.
Mar. 30, 1926	Senior Circuit Judge Waddill designated self to hold District Court at Richmond, Va.
June 3, 1926	Senior Circuit Judge Waddill designated self to hold District Court at Norfolk, Va.
Aug. 3, 1926	Senior Circuit Judge Waddill designated self to hold District Court at Huntington, W. Va.
Nov. 16, 1926	Senior Circuit Judge Waddill designated self to hold District Court at Norfolk, Va.
Jan. 17, 1927	Senior Circuit Judge Waddill designated self to hold District Court at Norfolk, Va.
Jan. 29, 1927	Senior Circuit Judge Waddill designated self to hold District Court for Western District of Virginia.
Sept. 6, 1927	Acting Senior Circuit Judge Parker designated self to hold District Court at Norfolk, Va.
Mar. 30, 1928	Senior Circuit Judge Waddill designated self to hold District Court at Norfolk, Va.
Aug. 23, 1928	Senior Circuit Judge Waddill designated self to hold District Court at Norfolk, Va.

Aug. 13, 1928 **Senior Circuit Judge Waddill designated self to hold District Court at Norfolk, Va.**

Dec. 2, 1929 **Senior Circuit Judge Waddill designated self to hold District Court for Eastern District of North Carolina.**

Sept. 24, 1931 **Senior Circuit Judge Parker designated self to hold District Court at Shelby, N. C.**

WESTERN UNION

1932 OCT 15 AM 11 22

VEA 68 40 DL GOVT—LOUISVILLE KY 15 1007A

HONORABLE MARTIN T MANTON
UNITED STATES CIRCUIT JUDGE FEDERAL BUILDING NYK

JUDGE DENISON DID IT IN KENTUCKY CASE AND AFTER THE APPOINTMENT OF SPECIAL MASTER DESIGNATED A DISTRICT JUDGE THE REGULAR JUDGE BEING DISQUALIFIED STOP I AM DESIGNATING MYSELF IN TENNESSEE CASE THIS WEEK THE JUDGE FOR THE DISTRICT BEING DISQUALIFIED

CHAS H MOORMAN

WESTERN UNION

1932 OCT 15 PM 12 26

CD54 46 GOVT—CHICAGO ILL 15 1113A

HON MARTIN T MANTON UNITED STATES CIRCUIT JUDGE
FEDERAL BLDG NYK

EVER SINCE I HAVE BEEN JUDGE SENIOR CIRCUIT JUDGE HAS FROM TIME TO TIME ASSIGNED HIMSELF THE SAME AS OTHER CIRCUIT JUDGES TO SIT IN DISTRICT COURTS FOR YEARS IT HAS BEEN CUSTOM TO ASSIGN HIMSELF AND COLLEAGUES FOR EACH TERM OF DISTRICT COURT AT CHICAGO

SAMUEL ALSCHULER

WESTERN UNION

1932 OCT 15 AM 11 34

RXKC129 34 GOVT—KANSASCITY MO 15 1029A

HON MARTIN T MANTON
SENIOR U S CIRCUIT JUDGE NYK

WIRE RECEIVED IT WAS THE CUSTOM OF JUDGE SANBORN AND HAS BEEN MY CUSTOM TO MAKE ASSIGNMENTS OF OURSELVES TO DISTRICT COURT WHENEVER NECESSARY STOP THIS HAS BEEN PARTICULARLY SO IN CASE OF RECEIVERSHIPS

KIMBROUGH STONE

WESTERN UNION

1932 OCT 15 PM 3 14

B187 56 GOVT—GA SANFRANCISCO CALIF 15 1202P

HON M T MANTON U S CIRCUIT JUDGE
FEDERAL BLDG NEWYORK NY

THE CLERK INFORMS ME IT WAS NOT THE PRACTICE OF MY PREDECESSOR JUDGE GILBERT TO ASSIGN HIMSELF TO THE DISTRICT COURT STOP I HAVE DONE SO ONCE AT THE REQUEST OF A DISTRICT JUDGE AND ONCE WHERE THE DISTRICT JUDGE WAS ABSENT AND AN EXTENSION OF TIME WAS NECESSARY TO PRESERVE THE RIGHTS OF THE PARTIES

CURTIS D WILBUR

WESTERN UNION

1932 OCT 15 PM 12 38

VB84 20 GOVT COLLECT—DENVER COLO 15 1030A

HON M T MANTON
US CIRCUIT JUDGE NYK

SINCE TENTH CIRCUIT ESTABLISHED HAVE OCCASION TO ASSIGN MYSELF ONCE TO HEAR CASE IN DISTRICT COURT STOP NO PREDECESSOR

ROBT E LEWIS

Respectfully submitted,

NATHAN L. MILLER,
Counsel for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, Respondents.

RESPONDENT'S BRIEF

FILE COPY

MAR 1 1

CHARLES

IN THE

Supreme Court of the United States

OCTOBER TERM—1932.

Nos. 711 and 721.

BENJAMIN F. JOHNSON,
Petitioner,

against

MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER

of

The INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

BRIEF OF RESPONDENT THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY IN OPPOSITION TO PETITIONS OF BENJAMIN F. JOHNSON AND LILLIAN BOEHM FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BREED, ABBOTT & MORGAN,
Counsel for Respondent The American Brake Shoe and Foundry Company,
15 Broad Street,
New York, N. Y.

CHARLES H. TUTTLE,
PARIS S. RUSSELL,
W. K. PETIGRUE,
Of Counsel.

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IN THE

Supreme Court of the United States

NOS. 711 AND 721.

BENJAMIN F. JOHNSON,
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against
MANHATTAN RAILWAY COMPANY, *et al.*,
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THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
of
THE INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

BRIEF OF RESPONDENT THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY IN OPPOSITION TO PETITIONS OF BENJAMIN F. JOHNSON AND LILLIAN BOEHM FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 1024) is reported in 61 Fed. (2d) 934 (Advance Sheets of January 23, 1933). The opinion of Judge Woolsey in the District Court (R. 694) is reported in 1 Fed. Supp. 809 (Advance Sheets of January 9, 1933).

Statement of Facts.

On June 29, 1932, the eight appointed Judges of the United States District Court for the Southern District of New York adopted two "rules" called Rule 1-a and Rule 11-a* and undertook to add them to the General Rules of the District Court for that District. *These two "rules" were never concurred in by a majority of the Circuit Judges of the Second Judicial Circuit* (R. 714).

On August 25, 1932, Judge Manton signed an order pursuant to the provisions of Sections 22 and 23 of Title 28 of the United States Code (Judicial Code, Sections 18 and 19), in which he found that the public interest required that a Circuit Judge be designated to hold a District Court within such Circuit, and designated and assigned himself to hold such Court during the period beginning August 25, 1932, and particularly to hear and determine all applications and proceedings in the suit of The American Brake Shoe and Foundry Company *vs.* Interborough Rapid Transit Company (R. 177). This order is hereinafter referred to as the "Designation Order," and was filed on August 26, 1932 (R. 178).

On the same day Judge Manton made an order with respect to the division of business in the District Court for

---

* Rule 1-a. Any judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the Senior District Judge.

Rule 11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the bankruptcy rules), shall be made to the judge assigned to hold the bankruptcy and motion part of the business of the court and to no other judge.

the Southern District of New York (R. 178), in which order he expressed his dissent from "Rules" 1-a and 11-a. This order is referred to hereinafter as the "Division of Business Order," and was filed on August 26, 1932 (R. 179).

On August 26, 1932, the bill of complaint in the Brake Shoe suit (R. 153) was filed. The bill was in the nature of a creditor's bill and prayed, among other things, for the appointment of a receiver or receivers for respondent Interborough Rapid Transit Company. On the same day Interborough answered and admitted all the allegations of said bill of complaint and consented to the appointment of a receiver or receivers (R. 171).

Also, on August 26, 1932, an order was made by Judge Manton, as a Circuit Judge designated to hold a District Court for the Southern District of New York, appointing Hon. Victor J. Dowling and Thomas E. Murray, Jr., Esq., temporary receivers of Interborough and its property (R. 180). This order further directed the parties to the suit to show cause on September 22, 1932, why the receivership should not be continued during its pendency, *and also directed that upon the hearing thereon any other creditor of defendant or other party in interest might be heard.*

On September 6, 1932, Judge Manton made an order in the Brake Shoe suit, upon the petition of Manhattan, in which he ordered that Manhattan be made a party defendant in said suit and appointed William Roberts temporary receiver of Manhattan (R. 196). This order contained a similar provision for a hearing of any person in interest on September 22, 1932.

On September 22, 1932, Judge Manton heard arguments as to the continuation of the Interborough and Manhattan

receiverships during the pendency of the Brake Shoe suit, *at which hearings neither of the petitioners appeared or interposed any claim or objection to the proceedings or their conduct,* although it is clear that they had actual prior notice thereof, since the Johnson bill of complaint and the Boehm petition for intervention, which are hereinafter referred to, were filed prior to the date fixed for such hearings (R. 5). On September 28, 1932, Judge Manton made an order continuing said receiverships during the pendency of the Brake Shoe suit (R. 223).

Since the commencement of the Brake Shoe suit many administrative orders have been made from time to time by Judge Manton (R. 191, 189, 193, 201, 221, 214, 226).

The suit of Benjamin F. Johnson *v.* Manhattan Railway Company, the first above entitled cause, which is referred to hereinafter as the Johnson suit, was begun on September 20, 1932. Johnson's bill of complaint asserts lack of jurisdiction in Judge Manton because of non-compliance with "Rules" 1-a and 11-a.

Thereafter petitioner Lillian Boehm intervened in the Johnson suit as a party plaintiff (R. 137) and filed a "supplemental" bill of complaint (R. 80) in the nature of a creditor's bill to which were added allegations similar to those contained in bill of complaint of petitioner Johnson.

Both petitioner Boehm and petitioner Johnson in their respective bills of complaint in the Johnson suit alleged that the appointment of receivers for Interborough was imperative (R. 286, 24). Their claim was that the receivers should be appointed by some other Judge than Judge Manton (R. 1024). The whole controversy which they are pressing involves in practical effect only this point.

Judge Woolsey, after hearing on October 4, 1932, and October 6, 1932, arguments on motions brought on in the Johnson suit by three orders to show cause (R. 114, 123 and 130) and rendering an opinion thereon on October 13, 1932 (R. 694), made on October 18, 1932, the so-called Consolidation Order (R. 722) and the so-called Vacating Order (R. 725).

In the Vacating Order Judge Woolsey vacated all orders in the Brake Shoe suit signed by Judge Manton on or after August 26, 1932, but specifically refused for want of jurisdiction to vacate the Designation Order and the Division of Business Order signed by Judge Manton on August 25, 1932 (R. 728-729).

Judge Woolsey's orders have been reversed by the Circuit Court of Appeals.

Summary of Argument.

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I.	The Designation Order made by the Senior Circuit Judge was a valid exercise of power....	7
II.	"Rules" 1-a and 11-a are invalid for all purposes; and, in any event, they were not binding upon Judge Manton as a Circuit Judge designated to hold a District Court.....	11
III.	Judge Woolsey had no power to vacate orders made by Judge Manton in the Brake Shoe suit for the further reasons (1) that Judge Manton's status in that suit was at least that of a judge *de facto*, and (2) that the orders made by Judge Manton in the Brake Shoe suit were not open to collateral attack....	17

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IV.	Judge Woolsey's lack of power to make any order in the Johnson suit vacating Judge Manton's orders in the Brake Shoe suit was not affected by the Consolidation Order, since even if the Consolidation Order were proper it could not result in merging the two suits into one cause	20
V.	In addition, a disregard of a rule of Court merely directory or regulating practice or assigning business as between judges, does not affect the jurisdiction of the Court itself and cannot subject the orders of the Court to collateral attack,—especially where the parties to the cause have waived the application of the rule	22
VI.	By Judge Manton's order appointing receivers, the complainants were extended an opportunity to present in the Brake Shoe case itself the so-called jurisdictional points which they are now urging	23

ARGUMENT.

POINT I.

The Designation Order made by the Senior Circuit Judge was a valid exercise of power. Judge Woolsey, as his order expressly recognized, had no jurisdiction to vacate it or to review or reverse its finding and declaration that the public interest required its making. No appeal was taken by either Johnson or Boehm from Judge Woolsey's denial of their motion to vacate this order.

A.

*Sections 22 and 23.

Section 22 of Title 28 of the United States Code (Judicial Code, Section 18) so far as material, reads as follows:

> "The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the senior circuit judge thereof, may, *if the public interest requires*, designate and assign any circuit judge of a judicial circuit to hold a district court within such circuit . . .
>
> "During the period of service of any judge designated and assigned under this chapter, he shall have all the powers, and rights, and perform all the duties, of a judge of the district, or a justice of the court, to which he has been assigned (excepting the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds)." (Italics ours.)

---

* When reference is made in this brief to Section 13, Section 22, Section 23, Section 27, Section 730 or Section 731, the reference is to Title 28 of the United States Code unless otherwise specified.

Section 23 of Title 28 of the United States Code (Judicial Code, Section 19) reads as follows:

> "It shall be the duty of the district or circuit judge who is designated and appointed under either of sections 17 to 22 of this title, to discharge all the *judicial duties for which he is so appointed,* during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, *in pursuance of said provisions,* shall have the same effect and validity as if done by or before the district judge of the said district." (Italics ours.)

B.

The Designation Order and Judge Woolsey's acknowledgment of lack of jurisdiction to vacate it.

The Designation Order of August 25, 1932, contains a specific finding that "the public interest" required its making (R. 177). That finding was beyond review and must be deemed valid. The power to make it is committed to the Chief Justice, the Justice of the Circuit, and the Senior Circuit Judge *alone.* The statute does not require a recital of reasons.

Moreover, both Courts below have expressly refused to reverse this determination as to the "public interest" (R. 728, 1032). This finding of fact therefore cannot be challenged in this Court by the *ex parte* assertions to the contrary by these petitioners.

Judge Woolsey in the Vacating Order *denied,* "for want of jurisdiction," the motions of the petitioners herein in so far as they sought to have the Designation Order and the Division of Business Order vacated (R. 728-729). *From*

this provision of Judge Woolsey's order no appeal was taken by either of the present petitioners.

Surely, Judge Manton's power to make that order implies the power to carry it into effect and, therefore, includes the power to make the subsequent orders which petitioners have attempted to have set aside in a collateral proceeding.

Chaos would result if the Circuit Judge sitting under designation of the Senior Circuit Judge could be declared "a mere usurper" by a District Judge at the instance of a litigant who denied the existence of the "public interest" found and declared by the Senior Circuit Judge.

C.

Under Sections 22 and 23 designation may be made for the "discharge of all the judicial duties" in a particular suit.

Section 22 is not limited in any way to a public interest arising from congestion of calendar, or shortage of judges, or illness, absence, or disqualification of judges, or the nature or quantity of specific business which may be before the Court.

Since Congress has expressly imposed these powers and duties upon the judge authorized to designate and upon the judge designated, no authority rests in the District Judges to veto, limit, restrict or question their exercise by the judge designating or the judge designated.

Section 23 specifically makes it the duty of a judge so designated "to discharge all the judicial duties *for which he is so appointed*, during the time for which he is so appointed." (Italics ours.) This expressly contemplates that

a judge may be designated to discharge *specific* judicial duties.

That the public interest referred to in Section 22 and similar statutes may properly center in a specific case, see:

U. S. ex rel. Fehsenfeld v. *Gill*, 292 Fed. (C. C. A., 4th, 1923) 136;

People ex rel. S. L. & T. Co. v. *Supreme Court*, 220 N. Y. 487, 491.

D.

Sections 22 and 23 have been universally interpreted by the judiciary to authorize the designation of a Circuit Judge to take jurisdiction over a particular suit or a particular class of business.

The validity of a designation by the Senior Circuit Judge of himself and of inclusion in such designation of a specific case or subject matter rests, as shown by the instances cited in the affidavit of Mr. J. Osgood Nichols (R. 553-572, 655-662), and, as this Court knows from familiar judicial history, upon ample and repeated precedents established not only by the Senior Circuit Judges of the Second Judicial Circuit but by the Senior Circuit Judges in nearly every Circuit of the United States. A notable instance is *Pennsylvania Steel Co.* vs. *New York City Ry. Co.*, 221 Fed. 440, where Senior Circuit Judge Lacombe upheld the validity of the designation which he had made of himself under Sections 22 and 23 "to hold the district court in all matters pertaining to the above cause."

E.

"Rules" 1-a and 11-a cannot veto, or subordinate to the judgment of other judges, the exclusive statutory powers conferred by Sections 22 and 23.

> "No rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law."
>
> *Washington-Southern Co.* v. *Baltimore Co.*, 263 U. S. 629, 635.

How could the Chief Justice, a Circuit Justice or a Senior Circuit Judge effectuate his finding of the requirements of the public interest if, under "Rule" 1-a, the Senior District Judge refused to assign the designated circuit judge to any work, or assigned him only to work having no relation to the public interest in furtherance of which he was appointed; or if, under "Rule" 11-a, the designated Circuit Judge was prohibited from functioning in the very matter with respect to which such public interest existed?

POINT II.

Moreover, "Rules" 1-a and 11-a are invalid for all purposes; and, in any event, they were not binding upon Judge Manton as a Circuit Judge designated to hold a District Court.

Section 731 of Title 28 of the United States Code provides as follows:

> "Rules of Practice in District Courts. The district courts may, from time to time, and in any manner not inconsistent with any law of the United

States, or with any rule prescribed by the Supreme Court under section 730 of this title, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings" (R. S., §918).

Section 730 of Title 28 of the United States Code, referred to in the foregoing Section 731, provides as to equity and admiralty causes as follows:

> "REGULATION OF PRACTICE OF DISTRICT COURTS BY SUPREME COURT. The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, *of proceeding to obtain relief*, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, *and generally to regulate the whole practice*, to be used, in suits in equity or admiralty, by the district courts" (R. S., §917). (Italics ours.)

Supreme Court Equity Rule 79 provides as follows:

> "Rule 79. ADDITIONAL RULES BY DISTRICT COURT. —*With the concurrence of a majority of the Circuit Judges* for the circuit, the District Courts may make any other and further rules and regulations *for the practice, proceedings and process*, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same." (Italics ours.)

A.

"Rules" 1-a and 11-a, if rules at all, are rules governing practice, proceedings and/or process in equity, and are invalid since they have not been concurred in by a majority of the Circuit Judges in conformity with Supreme Court Equity Rule 79.

(1) The official title of this Court's formulation of rules under Section 730 is "Equity Rules of *Practice*"; and the comprehensive character of this formulation is shown by final Equity Rule 81, which declares:

> "These Rules shall be in force on and after February 1, 1913 and shall govern *all proceedings* in cases then pending or thereafter brought." (Italics ours.)

(2) It is quite true that the Equity Rules do not specifically set forth a practice for each proceeding in an equity cause. They themselves expressly recognize a residuum of subject matter not covered by the specific rules; and as to that residuum they provide in Rule 79 that, *with the concurrence of a majority of the Circuit Judges,* the district courts

> "may make any other further rules and regulations for the *practice, proceedings and process, mesne and final,* in their respective districts, not inconsistent with the rules hereby prescribed." (Italics ours.)

(3) "Rule" 1-a in so far as it purports to limit the exercise of equity jurisdiction by a *designated* judge, and "Rule" 11-a in so far as it purports to tell one seeking the appointment of equity receivers, where and before whom to apply, clearly affect not only the "practice," but also "pro-

ceedings," in an equity cause and also affect mesne "process" in an equity cause. Hence they fall squarely within Equity Rules 79 and 81 and therefore within the requirement that there should be *concurrence by a majority of the Circuit Judges.*

Furthermore, "Rule" 11-a purports to govern a "mode of proceeding to obtain relief" in equity (*to wit*, the mode of proceeding to obtain the relief of the appointment of a receiver in equity), and therefore by the very terms of Section 730 purports to be a rule in equity. (*Horn* v. *Pere Marquette R. Co.*, 151 Fed. 626, 634, 636.)

(4) Judge Woolsey makes the astonishing statement that "practice in equity in receivership cases only commences *after* the making of the order of appointment" (R. 714). An application in equity for the appointment of a receiver is "interlocutory" and "presupposes a pending case." (*Horn* v. *Pere Marquette R. Co.*, 151 Fed. 626, 634.)

B.

"Rules" 1-a and 11-a are also inconsistent with other provisions of substantive law.

(1) They are inconsistent with Section 13, Title 28, of the United States Code (Section 9 of the Judicial Code), which provides that District Courts as courts of equity "shall be deemed always open" and "*any* district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court."

(2) They are inconsistent with Rule 6 of the Equity Rules established by this Court, which provides that the judge may "at any time or place" "make and direct all interlocutory orders," etc.

(3) They are inconsistent with Sections 22 and 23 of Title 28 of the United States Code. (See Point I hereof, *supra.*)

C.

If it be contended that "Rules" 1-a and 11-a were authorized by Section 27 of Title 28 of the United States Code, they could have no binding effect upon Judge Manton who in no way participated in their adoption and who derived his power under Sections 22 and 23.

Section 27 of Title 28 of the United States Code (Judicial Code Section 23) reads as follows:

> "DISTRICT WITH MORE THAN ONE JUDGE; DIVISION OF BUSINESS. In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district."

(1) Petitioners urge that "Rules" 1-a and 11-a obtained authority from Section 27.

Judge Woolsey, however, stated in his opinion, that it was pursuant to the power vested in the District Court by Section 731 that it had made and promulgated these "Rules" (R. 713).

He expressly conceded that they "are not to be supported under that particular Section" (Section 27) (R. 888-890). They do not represent any temporary or periodical agreement between particular judges for the division of business among themselves but constitute an attempt to permanently regulate the "practice."

(2) Moreover, it is quite obvious that "Rules" 1-a and 11-a cannot, as Judge Woosey thus conceded, be deemed authorized by Section 27.

Any such construction would result in the right of the *regularly appointed* district judges to strip any designated judge, whether appointed by the Chief Justice, the Circuit Justice or the Senior Circuit Judge, of all powers.

Certainly Section 2[illegible] cannot be so construed as to be inconsistent with Sections 22 and 23 and the prior sections of Title 28 of the United States Code giving powers to judges designated pursuant thereto.

POINT III.

Judge Woolsey had no power to vacate orders made by Judge Manton in the Brake Shoe suit for the further reasons (1) that Judge Manton's status in that suit was at least that of a judge *de facto* and his acts as such could not be reviewed in the Johnson suit or by a judge of coordinate jurisdiction, and (2) that the orders made by Judge Manton in the Brake Shoe suit were not open to collateral attack.

"Rules" 1-a and 11-a, if they can have any validity at all, are merely directory. They cannot render Judge Manton a mere "usurper."

We submit that Judge Manton was, for all of the purposes of the Brake Shoe suit, a *de jure* judge; but in any event he was, for the purposes of that suit, at least a *de facto* judge.

(1) In the Brake Shoe suit the status of Judge Manton had back of it the following predicates:

> (a) A statute authorizing the Senior Circuit Judge of a Circuit to designate and assign any Circuit Judge of his Circuit to hold a District Court within his Circuit, if the public interest requires, and giving to a Circuit Judge so designated "all the powers and rights" of a judge of the district and requiring him to perform all the duties of such a judge (Section 22).
>
> (b) A judge acting as a Senior Circuit Judge in the Second Judicial Circuit and duly authorized so to act.

(c) A duly made order of such Senior Circuit Judge containing a finding that the public interest required that Judge Manton be designated and assigned as a Circuit Judge to hold a District Court within the Second Circuit and designating and assigning Judge Manton to hold a District Court for the Southern District of New York and particularly to hear and determine all applications and proceedings in the Brake Shoe suit (the Designation Order). The application of plaintiffs in the Johnson suit for the vacation of this order was denied by Judge Woolsey himself for want of jurisdiction and that portion of his order was never appealed from by the present petitioners (R. 728-9).

(d) A statute which provides that it shall be the duty of any Circuit Judge so designated "to discharge all the judicial duties for which he is so appointed" (Section 23).

(e) A suit (the Brake Shoe suit) over which, and over the subject matter of which, the District Court for the Southern District of New York had competent jurisdiction by reason of the necessary diversity of citizenship and the amount involved. Judge Woolsey in his opinion found this to be a fact (R. 712).

(f) Parties over whom in said suit the District Court for the Southern District of New York had personal jurisdiction. Judge Woolsey found this to be the fact in his opinion (R. 712).

(g) A consent by all the parties to said suit to the jurisdiction of Judge Manton in the suit.

(h) Judicial action taken by Judge Manton in the Brake Shoe suit pursuant to the provisions of the Designation Order.

All the conditions required to constitute Judge Manton at least a *de facto* judge in the Brake Shoe suit are present, *i. e.*, a duly constituted court, a duly instituted suit, jurisdiction in the court over the subject matter and the parties, and the exercise therein by Judge Manton, acting and purporting to act as judge of the court, of judicial powers under color of the direction and authority contained in the Designation Order and of Sections 22 and 23 of Title 28 of the United States Code.

(2) The status of a *de facto* judge cannot be attacked collaterally either in the suit in which he is acting or in any other suit. His right to hold his office can be questioned only in proceedings, regularly instituted for that purpose, to which he is a party, in the form provided by law.

Ball v. *United States*, 140 U. S. 118 (1891);
McDowell v. *United States*, 159 U. S. 596 (1895);
State ex rel. Buisson v. *Lazarus*, 33 La. Ann., 1425;
Luhrig Collieries Co. v. *Interstate Coal & Dock Co.*, 287 Fed. 711 (C. C. A., 2nd, 1923);
33 *Corpus Juris*, 933.

(3) *Case* v. *United States*, 14 Fed. (2d) 510, decided by the Circuit Court of Appeals for the Eighth Circuit and cited by Judge Woolsey in his opinion, is readily distinguishable. See discussion (R. 1031) in Circuit Court of Appeals opinion.

POINT IV.

Judge Woolsey's lack of power to make any order in the Johnson suit vacating Judge Manton's orders in the Brake Shoe suit was not affected by the Consolidation Order, since even if the Consolidation Order were proper it could not result in merging the two suits into one cause. The independent and separate existence of the two suits could not be affected by consolidation.

Moreover, Judge Woolsey could not do by indirection what he could not do by direction. Since he had no power in the Johnson suit to vacate orders in the Brake Shoe suit, he could not clothe himself with such power by forcibly reaching over into Judge Manton's court and possessing himself of the Brake Shoe suit by the alleged process of consolidation.

(1) The consolidation by Judge Woolsey of the Brake Shoe suit and the Johnson suit, even if effective, did not accomplish a merger of the two suits.

Since the suits remained separate and independent, an attempt in one of them to attack proceedings in the other is a collateral attack.

Toledo, etc., R. R. Co. v. *Continental Trust Co.*, 95 Fed. 497 (C. C. A. 6th, 1899) (certiorari denied 176 U. S. 219);

Taylor v. *Logan Trust Company*, 289 Fed. 51 (C. C. A. 8th, 1923);

Nolte v. *Hudson Nav. Co.*, 11 Fed. (2d) 680 (C. C. A. 2d, 1926);

Adler v. *Seaman,* 266 Fed. 828 (C. C. A. 8th, 1920);

Mutual Life Insurance Co. v. *Hillmon,* 145 U. S. 285;

1 *Corpus Juris,* 1137.

(2) The orders of Judge Manton were, as we have shown in Point III, valid whether or not Judge Manton was a *de jure* or *de facto* judge. Their validity as such was no less after than before the attempted consolidation.

(3) Furthermore, applying Judge Woolsey's own reasoning, his action was a violation of Equity Rule 4 of the Southern District of New York. This Rule provides, among other things:

> "In any suit in which a receiver is appointed the Judge who appoints the receiver shall retain supervision over the cause, including appointment of solicitors and applications for allowance."

This Rule had been submitted by the district judges to the circuit judges for approval in accordance with Supreme Court Equity Rule 79, and had been approved by the circuit judges.

POINT V.

In addition, a disregard of a rule of Court merely directory or regulating practice or assigning business as between judges, does not affect the jurisdiction of the Court itself and cannot subject the orders of the Court to collateral attack—especially where the parties to the cause have themselves waived the application of the rule.

(1) A party to a cause may waive even his constitutional rights as to practice and procedure in the conduct of a cause. *A fortiori,* where disregard by both parties of a rule of practice creates at most a mere irregularity, such irregularity does not make null and void the jurisdiction of the court.

Abbott v. *Brown,* 241 U. S. 606 (1916);
Lively v. *Picton,* 218 Fed. 401;
Payne v. *Garth,* 285 Fed. (C. C. A., 8th) 301 (1922);
People ex rel. Childs v. *Extraord. Trial Term,* 228 N. Y. 263.

(2) The opinion of the Circuit Court of Appeals (R. 1029 *et seq.*) amply demonstrates that "Rules" 1-a and 11-a were (if valid at all) directory and their disregard was at most no more than error.

POINT VI.

The question as to whether the complainants would have any means of reviewing the validity or propriety of Judge Manton's order appointing receivers is really irrelevant; but, even if this were otherwise, the complainants were extended by that very order an opportunity to present to him the so-called jurisdictional points which they are now urging. They were thereby furnished a forum, the privileges of which they neglected to utilize; and any adverse determination by Judge Manton they could have presented in the Circuit Court of Appeals for review.

(1) In the very order by which Judge Manton appointed temporary receivers of Interborough on August 26, 1932, and in his subsequent order on September 6, 1932, appointing a temporary receiver for Manhattan, he designated September 22, 1932, as a date when any creditor of either of these defendants or any "other party in interest" might show cause before him "why the receivership should not be continued" (R. 184, 200). These orders were known to Johnson and Boehm before September 22, 1932, because the Johnson bill of complaint, which refers to them, and the Boehm intervention were filed prior thereto.

This order in no way required the persons who responded thereto on the date fixed to become parties to the action or even to intervene. It expressly empowered and invited them on special or other appearance to present any reason whatever why Judge Manton should terminate or annul the receivership.

(2) There is nothing in Equity Rule 37 which would prevent an appeal by a person who so presented himself in

response to the invitation tendered in Judge Manton's aforesaid orders to show cause.

Courts of equity frequently permit parties to appear for the special purpose of being heard upon particular questions without becoming parties to the suit or without a general intervention under Equity Rule 37 which clearly contemplates intervention as a party.

Mitchell v. *Lay*, 48 Fed. (2nd) (C. C. A. 9), 79, 84, 85;

Blake v. *District Court*, 59 Fed. (2nd) (C. C. A. 9) 78, 79;

Kingsport Press, Inc. v. *Brief English Systems*, 54 Fed. (2nd) 497;

Wood v. *Oregon Development Co.*, 55 Fed. 901;

Christian v. *Hoe, Inc.*, decided by the Circuit Court of Appeals, 2nd Circuit, February 20, 1933, but not yet reported.

CONCLUSION.

For the foregoing reasons the petitions for writs of certiorari should be denied.

Dated New York, N. Y., March 7, 1933.

Respectfully submitted,

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Counsel for Respondent, The American Brake Shoe and Foundry Company.

CHARLES H. TUTTLE,
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Of Counsel.

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APR 17

IN THE

Supreme Court of the United States

OCTOBER TERM—1932.

NOS. 711 AND 721.

BENJAMIN F. JOHNSON,
Petitioner,

against

MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent,

IN THE MATTER

of

The INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

BRIEF OF RESPONDENT THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY.

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NOS. 711 AND 721.

BENJAMIN F. JOHNSON,
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BRIEF OF RESPONDENT THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 1024) is reported in 61 Fed. (2d) 934 (Advance Sheets of January 23, 1933). The opinion of Judge Woolsey in the District Court (R. 694) is reported in 1 Fed. Supp. 809 (Advance Sheets of January 9, 1933).

Statement of Facts.

On June 29, 1932, the eight appointed Judges of the United States District Court for the Southern District of

New York adopted two "rules" called Rule 1-a and Rule 11-a* and undertook to add them to the General Rules of the District Court for that District. *These two "rules" were never concurred in by a majority of the Circuit Judges of the Second Judicial Circuit* (R. 714).

On August 25, 1932, Judge Manton signed an order pursuant to the provisions of Sections 22 and 23 of Title 28 of the United States Code (Judicial Code, Sections 18 and 19), in which he found that the public interest required that a Circuit Judge be designated to hold a District Court within such Circuit, and designated and assigned himself to hold such Court during the period beginning August 25, 1932, "and particularly to hear and determine all applications and proceedings" in the suit of The American Brake Shoe and Foundry Company *vs.* Interborough Rapid Transit Company (R. 177). This order is hereinafter referred to as the "Designation Order," and was filed on August 26, 1932 (R. 178).

On the same day Judge Manton made an order with respect to the division of business in the District Court for the Southern District of New York (R. 178), in which order he expressed his dissent from "Rules" 1-a and 11-a. This order is referred to hereinafter as the "Division of Business Order," and was filed on August 26, 1932 (R. 179).

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* Rule 1-a. Any judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the Senior District Judge.

Rule 11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the bankruptcy rules), shall be made to the judge assigned to hold the bankruptcy and motion part of the business of the court and to no other judge.

On August 26, 1932, the bill of complaint in the Brake Shoe suit (R. 153) was filed. The bill was in the nature of a creditor's bill and prayed, among other things, for the appointment of a receiver or receivers for respondent Interborough Rapid Transit Company. On the same day Interborough answered and admitted (as it was bound to do) all the allegations of the bill of complaint and consented to the appointment of a receiver or receivers (R. 171).

Also, on August 26, 1932, an order was made by Judge Manton, as a Circuit Judge designated to hold a District Court for the Southern District of New York, appointing Hon. Victor J. Dowling and Thomas E. Murray, Jr., Esq., temporary receivers of Interborough and its property (R. 180). This order further directed the parties to the suit to show cause on September 22, 1932, why the receivership should not be continued during its pendency, *and also directed that upon the hearing thereon any other creditor of defendant or other party in interest might be heard.*

On September 6, 1932, Judge Manton made an order in the Brake Shoe suit, upon the petition of Manhattan Railway Company, in which he ordered that Manhattan be made a party defendant and appointed William Roberts temporary receiver of Manhattan (R. 196). This order contained a similar provision for a hearing of any person in interest on September 22, 1932.

On September 22, 1932, Judge Manton heard arguments as to the continuation of the Interborough and Manhattan receiverships during the pendency of the Brake Shoe suit, *at which hearings neither of the petitioners appeared or interposed any claim or objection to the proceedings or their conduct,* although it is clear that they had actual prior

notice thereof, since the Johnson bill of complaint and the Boehm petition for intervention, which are hereinafter referred to, were filed prior to the date fixed for such hearings (R. 5). The Johnson bill of complaint refers to these orders (R. 43).

On September 28, 1932, Judge Manton made an order continuing the receiverships during the pendency of the Brake Shoe suit (R. 223).

Since the commencement of the Brake Shoe suit many administrative orders have been made from time to time by Judge Manton (R. 191, 189, 193, 201, 221, 214, 226).

The suit of Benjamin F. Johnson *v.* Manhattan Railway Company, the first above entitled cause, which is referred to hereinafter as the Johnson suit, was begun on September 20, 1932. Johnson's bill of complaint, brought by him as a stockholder of Manhattan, asserts lack of jurisdiction in Judge Manton because of non-compliance with "Rules" 1-a and 11-a.

Thereafter petitioner Lillian Boehm intervened in the Johnson suit as a party plaintiff (R. 137) and filed a "supplemental" bill of complaint (R. 80) in the nature of a creditor's bill to which were added allegations similar to those contained in bill of complaint of petitioner Johnson.

Both petitioner Boehm and petitioner Johnson in their respective bills of complaint in the Johnson suit alleged that the appointment of receivers for Interborough was imperative (R. 286, 24). Their allegations of fact were similar to those in the Brake Shoe bill. Their claim was that the receivers should be appointed by some other Judge than Judge Manton (R. 1024). **The whole controversy which they are pressing involves in practical effect only this point** (R. 1028). As said below (R. 1028):

"The dispute touches merely who shall be the receivers, and who the judge to have charge of the receivership."

Judge Woolsey, after hearing on October 4, 1932, and October 6, 1932, arguments on motions brought on in the Johnson suit by three orders to show cause (R. 114, 123 and 130) and rendering an opinion thereon on October 13, 1932 (R. 694), made on October 18, 1932, the so-called Consolidation Order (R. 722) and the so-called Vacating Order (R. 725). He further directed that upon certain contingencies application might be made for the appointment of receivers (R. 698).

In the Vacating Order Judge Woolsey vacated all orders in the Brake Shoe suit signed by Judge Manton on or after August 26, 1932, as *coram non judice* (R. 720); but he specifically refused for want of jurisdiction to vacate the Designation Order and the Division of Business Order signed by Judge Manton on August 25, 1932 (R. 728-729).

Judge Woolsey's orders have been reversed by the Circuit Court of Appeals.

Summary of Argument.

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I. The Designation Order made by the Senior Circuit Judge was a valid exercise of power. Judge Woolsey, as his own order expressly recognized, had no jurisdiction to vacate it or to review or reverse its finding and declaration that the public interest required its making. No appeal was taken by either Johnson or Boehm from Judge Woolsey's denial of their motion to vacate this order.

Sections 22 and 23 are a full and complete grant of power both to the designating and to

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the designated judge; and it is not necessary to look elsewhere for their authority..... 8

II. "Rules" 1-a and 11-a cannot veto, or subordinate to the judgment of other judges, the exclusive and complete statutory powers conferred by Sections 22 and 23 both upon the designating judge and the designated judge..... 24

III. Moreover, "Rules" 1-a and 11-a are invalid for all purposes..... 29

IV. Judge Woolsey had no power to vacate orders made by Judge Manton in the Brake Shoe suit for the further reasons (1) that Judge Manton's status in that suit was at least that of a judge *de facto* and his acts as such could not be reviewed in the Johnson suit or by a judge of coordinate jurisdiction, and (2) that the orders made by Judge Manton in the Brake Shoe suit were not open to collateral attack.

"Rules" 1-a and 11-a, if they can have any validity at all, are solely directory. They cannot render Judge Manton a mere "usurper".... 45

V. In addition, a disregard of a rule of Court merely directory or regulating practice or assigning business as between judges, does not affect the jurisdiction of the Court itself and cannot subject the orders of the Court to collateral attack—especially where the parties to the cause have themselves waived the application of the rule..... 53

VI. Judge Woolsey's lack of power to make any order in the Johnson suit vacating Judge Manton's orders in the Brake Shoe suit was not affected by the Consolidation Order, since even if the Consolidation Order were proper

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it could not result in merging the two suits into one cause. The independent and separate existence of the two suits could not be affected by consolidation.

Moreover, Judge Woolsey could not do by indirection what he could not do by direction. Since he had no power in the Johnson suit to vacate orders in the Brake Shoe suit, he could not clothe himself with such power by forcibly reaching over into Judge Manton's court and possessing himself of the Brake Shoe suit by the alleged process of consolidation..... 59

VII. The question as to whether the petitioners would have any means of reviewing the validity or propriety of Judge Manton's order appointing receivers is really irrelevant; but, even if this were otherwise, the petitioners were extended by that very order an opportunity to present to him the so-called jurisdictional points which they are now urging. They were thereby furnished a forum, the privileges of which they neglected to utilize; and any adverse determination by Judge Manton they could have presented in the Circuit Court of Appeals for review..... 64

VIII. The Johnson bill supplied the District Court with no jurisdiction; and the absence of jurisdiction could not be remedied by the intervening complaint of Lillian Boehm..... 68

IX. The power of the Court to appoint receivers on the suit of a simple contract creditor on consent of the defendant and the claim made in the petitioners' briefs that the Brake Shoe suit was collusive, are altogether separate and distinct matters. Neither matter is presented by this record or is before this Court 71

ARGUMENT

POINT I.

The Designation Order made by the Senior Circuit Judge was a valid exercise of power.

Judge Woolsey, as his own order expressly recognizes, had no jurisdiction to vacate it or to review or reverse its finding and declaration that the public interest required its making; and no appeal was taken by either Johnson or Boehm from Judge Woolsey's denial of their motion to vacate this order.

Sections 22 and 23 of Title 28 of the United States Code expressly clothed Judge Manton with full jurisdiction to make the Designation Order, and to sit as a Judge in the Brake Shoe suit. That jurisdiction could not in any way be limited or restricted by any District Judge or Judges, or invalidated by any order in the Johnson suit.

Sections 22 and 23 are a full and complete grant of power both to the designating and to the designated Judge; and it is not necessary to look elsewhere for their authority.

A.

*Sections 22 and 23.

Section 22 of Title 28 of the United States Code (Judicial Code, Section 18) so far as material, reads as follows:

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* When reference is made in this brief to Section 22, Section 23, Section 27, Section 730 or Section 731, the reference is to Title 28 of the United States Code unless otherwise specified.

> "The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the senior circuit judge thereof, may, *if the public interest requires,* designate and assign any circuit judge of a judicial circuit to hold a district court within such circuit . . .
>
> "During the period of service of any judge designated and assigned under this chapter, he shall have all the powers, and rights, and perform all the duties, of a judge of the district, or a justice of the court, to which he has been assigned (excepting the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds)." (Italics ours.)

Section 23 of Title 28 of the United States Code (Judicial Code, Section 19) reads as follows:

> "It shall be the duty of the district or circuit judge who is designated and appointed under either of sections 17 to 22 of this title, to discharge all the *judicial duties for which he is so appointed,* during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, *in pursuance of said provisions,* shall have the same effect and validity as if done by or before the district judge of the said district." (Italics ours.)

These sections were enacted at the time when the Circuit Courts were abolished. Their purpose plainly was to enable the Circuit Judges to continue to exercise as theretofore original jurisdiction, if the Chief Justice, the Circuit Justice or the Senior Circuit Judge considered it in the public interest.

District Judges of other districts can be designated only for specific reasons, such as accumulation of business or

disability or bias of a District Judge. See Sections 17, 19, 21. But *Circuit* Judges can be designated "if the public interest requires." See Sections 22 and 23.

B.

The Designation Order and Judge Woolsey's acknowledgment of lack of jurisdiction to vacate it.

(1) The Designation Order of August 25, 1932, contains a specific finding that "the public interest" required its making (R. 177).

That finding was beyond review and must be deemed valid. The power to make the determination as to "public interest" is committed to the Chief Justice, the Justice of the Circuit, and the Senior Circuit Judge *alone*.

The determination once made by the statutory repository of the power is an administrative act which cannot be challenged, inquired into, reviewed, or reversed elsewhere, —*a fortiori* not collaterally by a District Judge (R. 1032). Judge Woolsey himself seems to have conceded as much (R. 971-3).

The statute does not require a recital of the reasons for the finding; and none is requisite or demandable. Although Section 22 (unlike Section 21) does not contain the words "in his judgment," they are implied, since the determination of the public interest involves an act of judgment by the sole repository of this statutory power. As said by Judge Hand below (R. 1032):

> "It cannot be that the act of the Chief Justice, for example, or of a Circuit Justice, is to be subjected to a scrutiny when designating a Circuit Judge, to which it is not open in the case of a District Judge."

That the simple finding of a public interest in a designation order is sufficient is amply borne out in *Craig* v. *Hecht,* 263 U. S. 255, in which there was before the Supreme Court a designation order in which the only statement with respect to public interest was "In order to meet the requirements of the public interest." The sufficiency of that designation order was not questioned by this Court.

(2) Judge Woolsey in his "Vacating Order" (whatever may be the implications of his opinion) has recognized these incontrovertible principles, for his order provides at the end (R. 728):

> "Ordered, adjudged and decreed that, in so far as said motions seek to have vacated the orders made and signed on August 25, 1932 by Honorable Martin T. Manton in his capacity as Senior Circuit Judge, they are denied for want of jurisdiction."

From this provision of Judge Woolsey's order no appeal has ever been taken by the complainant or intervenor in the Johnson suit. Hence, the denial of their motions "for want of jurisdiction" stands as binding on all parties not only as regards the whole of each of Judge Manton's orders of August 25th, but also as regards each and every part thereof, for the motions to vacate by the complainant and intervenor in the Johnson suit had run not only to the whole but to each part of these orders and asked for such other and further relief as might be proper (R. 115, 116, 131 and 132).

(3) Moreover, this Court will observe that Judge Woolsey, in phrasing his denial in this respect of the complainant's and intervenor's motions, declared not only his own "want of jurisdiction" but also that the orders of

August 25th were made by Judge Manton "in his capacity as senior circuit judge."

But Judge Manton could act in that "capacity" only under and by authority of Sections 22 and 23; and Judge Woolsey could lack "jurisdiction" to vacate his action only because Judge Manton had acted under and by authority of that statutory commission. If Judge Manton, in making the Designation Order of August 25th, did not have back of him the authority of those sections, then his said order would have rested on nothing; and, in that event, Judge Woolsey, according to the logic of his own opinion, would have had as to it the same power to vacate as he claims to have had in the case of Judge Manton's later orders.

(4) *At the threshold, therefore, lies this grave question:* Since Judge Woolsey's own order recognizes that Judge Manton's Designation Order was made "in his capacity as Senior Circuit Judge" under Sections 22 and 23, and that, therefore, he (Judge Woolsey) had "want of jurisdiction" to vacate it in whole or in part, how did Judge Woolsey acquire jurisdiction to vacate Judge Manton's subsequent "discharge" under authority of Section 23 of "all the judicial duties for which he is so appointed" by the Designation Order under authority of Section 22?

Surely, Judge Manton's power to make that order implies the power to carry it into effect and, therefore, includes the power to make the subsequent orders which, in a collateral proceeding, Judge Woolsey has attempted to vacate.

Chaos would result if the Circuit Judge sitting under designation of the Senior Circuit Judge could be declared "a mere usurper" by a District Judge at the instance of a

litigant who denied the existence of the "public interest" found and declared by the Senior Circuit Judge.

In other words, Sections 22 and 23 are *complete in themselves.* They grant full and complete power both to the designating judge and to the designated judge, and it is not necessary to look elsewhere for their authority or to attempt to piece it out by reference to other statutes. The authority conferred by those sections cannot be added to or subtracted from by mere rules of court.

(5) If, however, grounds for a finding of "public interest" are sought, they are described in the brief of counsel for the petitioner Boehm. That brief speaks of the "great economic, social and even political significance of the Interborough receivership" (p. 15); acknowledges it to be "a receivership involving *so great a public interest*" (p. 33); and asserts "the economic importance and political sensitivity of the receivership" (p. 36).

Counsel's reference in the petitioners' brief to some opinion by Judge Manton several months after August 25th, 1932, is wholly irrelevant. That opinion is not part of the record; and the validity of the Designation Order cannot be affected one way or the other by observations made months later, however cogent they may be as demonstrative of a public interest.

C.

Under Sections 22 and 23 designation may be made for the "discharge of all the judicial duties" in a particular suit.

(1) Section 22 is not limited in any way to a public interest, arising from congestion of calendar, or shortage of judges, or illness, absence, or disqualification of judges, or

the nature or quantity of specific business which may be before the Court. The statute requires as a condition for the exercise of the power therein conferred nothing at all except the presence in the opinion of the Senior Circuit Judge of a "public interest."

Quite obviously, and as a result of necessary logic, such public interest may, in the opinion of the Senior Circuit Judge, arise from and attach itself to some specific subject matter, some specific business, or some specific case which is, or is about to be, before the Court. In that event it is not only within the power, but it is the duty, of the Senior Circuit Judge to make a designation with respect to such specific subject-matter, business, or case. By like token, it is not only within the power, but it is the duty, of the judge so designated to "discharge all the judicial duties for which he is so appointed" (Section 23).

Since Congress has expressly imposed these powers and duties upon the judge authorized to designate and upon the judge designated, no authority rests in the District Judges to veto, limit, restrict or question their exercise by the judge designating or the judge designated.

(2) Our view is reinforced by the fact that Section 23 specifically makes it the duty of a judge so designated "to discharge all the judicial duties *for which he is so appointed, during the time for which he is so appointed.*" (Italics ours.)

This expressly contemplates that a judge may be designated to discharge *specific* judicial duties. In that case the definition of such duties must necessarily be contained in the order of designation and appointment, and cannot be added to or subtracted from by some outside source or some other power or judge.

Under this section, the powers and the accompanying duties imposed upon the designated judge are not permissive, but *mandatory*. He must discharge all that the order of his appointment requires of him. (*Ex parte United States,* 226 U. S. 420, 423.)

(3) Section 22 of Title 28 of the United States Code (Judicial Code, Section 18), as authority for a designation to try a *specific* case, was considered by the Circuit Court of Appeals for the Fourth Circuit in *U. S. ex rel. Fehsenfeld* v. *Gill,* 292 Fed. 136 (C. C. A. 4th, 1923). There a District Judge was disqualified to hear a particular suit for the reason that he had been of counsel. Thereupon, as stated in the opinion, Senior Circuit Judge Hon. Martin A. Knapp, "by order designated Hon. Edmund Waddill, Jr., Circuit Judge, *to try the case.*" (Italics ours.) Judgment went against the plaintiffs; and they appealed, denying the validity of the designation of a Circuit Judge and the jurisdiction of the Court.

Plaintiff in error argued that the consequences of the disqualification of the District Judge were governed exclusively by Section 20 of the Judicial Code (Section 24 of Title 28 of the United States Code), providing for the designation of a District Judge under such circumstances and that, therefore, the designation of a Circuit Judge was without authority of law.

In affirming the judgment below the Court stated:

> "* * * The 'public interest' is involved in all the conditions mentioned in sections 13, 14, and 20. Therefore we construe section 18 of the Judicial Code to authorize the Chief Justice, or circuit justice, or the senior circuit judge, to designate a circuit judge

> to hold the district court when any of the conditions mentioned in sections 13, 14, and 20 or any other conditions, arise which in his judgment so involve the public interest as to require the designation of another judge to hold any District Court."

A perfect precedent is also to be found in the unanimous decision of the New York Court of Appeals in *People ex rel. S. L. & T. Co.* v. *Supreme Court*, 220 N. Y. 487. In that case, the Governor of New York had issued a proclamation for an extraordinary term of the Supreme Court, under color of the authority of Section 153 of the Judiciary Law of that State. That statute authorized him to appoint such extraordinary term whenever "*in his opinion the public interest so requires.*" The proclamation of the Governor merely recited that the appointment of such extraordinary term appeared to his satisfaction to be required in the public interest (p. 490). Furthermore, the proclamation was not one for an extraordinary term for all purposes but was *expressly limited to* "the purpose of hearing and determining motions for new trials" in *specific actions of ejectment* brought by relator (which actions were identified by their titles), "and in the event new trials were granted, then to try said actions."

The relator insisted that an extraordinary term for such *specific* purpose and *specific* case was not within the purview of the enabling statute; and it proposed to show that no public interest required it. In refusing to enter upon such an inquiry and in holding that the Governor in his uncontrolled judgment might declare the public interest to rise from or in *a specific suit*, the Court of Appeals said, per Cardozo, J. (p. 491):

"The relator insists that an extraordinary term is needless. That is a question for the governor, and no one else. We cannot review the exercise of his discretion (*People* v. *Shea, supra; State* v. *Register,* 133 N. C. 746; *State* v. *Lewis,* 107 N. C. 967; *Matter of Guden,* 171 N. Y. 529). There may be reasons for urgency which we cannot know. The governor is not required to disclose them. He may have thought that the public interest demands the expeditious determination of actions affecting the title of the state. *But the whole subject is beyond our province. The power and the responsibility are his, and his only.*" (Italics ours.)

(4) No limitation is prescribed upon the general power given to the Senior Circuit Judge to designate in accordance with the public interest as he conceives it. The general power to designate for all purposes must logically, and in the absence of any limitation contained in the statute, include the lesser power to designate for a specific purpose or subject matter if such specific purpose or subject matter is the origin or the cause of the public interest which the Senior Circuit Judge finds to exist.

In other words, the power is *co-terminous* with the public interest as the Senior Circuit Judge finds it; and the general power necessarily implies and carries with it all subsidiary and incidental powers necessary or proper to effectuate and promote such public interest.

Under sections 22 and 23 the ordinary presumption of the valid exercise of an express power becomes in this case conclusive.

D.

Judge Lacombe's action in the Metropolitan Receivership case.

It appears from the decision in *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 221 Fed. 440, that in 1911 when the new Judicial Code went into effect and the old circuit courts ceased to exist, there were several causes in the Southern District of New York and one or more in Connecticut which had been theretofore conducted each before a single circuit judge and which had not yet been completed. Among them was the *Pennsylvania Steel Co.* case, *supra.*

In each of these cases an order was made by the Senior Circuit Judge designating the particular Circuit Judge who had it in charge to finish the case. In the *Pennsylvania Steel* case, Judge Lacombe, Senior Circuit Judge, had been acting and a self-designation order was accordingly entered by him designating himself "to hold the district court in all matters pertaining to the above cause." *It is clear that in each of these instances he deemed that the public interest lay in the particular case itself and in nothing else, and that Sections 22 and 23 authorized him to designate even himself in a particular case.*

Could it be seriously contended that to head off Judge Lacombe's designation of himself to hold the District Court in all matters pertaining to the *Pennsylvania Steel* case, the District Judges could have adopted a so-called rule similar in effect to "Rule" 1-a (R. 702); and that, in the event of the failure or refusal of the Senior District Judge to permit Judge Lacombe as such a designated judge to take jurisdiction over that case, a litigant in another suit or even in the case itself could have successfully attacked

collaterally before a district judge any orders by Judge Lacombe on the ground that there was a total lack of jurisdiction in him?

While the fact that motivated Judge Lacombe in concluding that the public interest required the appointment of himself to handle that particular case was the fact that he had theretofore been engaged therein, such existing fact cannot be considered as exclusive of all reasons or other states of fact which could properly motivate a Senior Circuit Judge in reaching a like conclusion as to another specific case. Such reasons could be multiplied without number, but so to do is both unnecessary and irrelevant.

E.

The universal practical construction of Sections 22 and 23.

This practical construction by the judiciary itself is set forth in detail and beyond the possibility of contradiction in the affidavit of Mr. Nichols (R. 553-572, 655-662), wherein there are detailed many instances from the second circuit and from other circuits where Senior Circuit Judges have not only designated themselves to hold a District Court, but have specified a specific case or subject-matter with which they are to deal in holding the Court.

See, for example, orders by Senior Circuit Judge Lacombe, dated January 17, 1913 (R. 655-658), and the order of Senior Circuit Judge Waddill attached *in extenso* to Mr. Nichols' affidavit (R. 662); and see the other instances set forth in Mr. Nichols' affidavit (R. 553-556).

With knowledge of this universal practice, Congress has left it unchanged for twenty years.

As illustrative of the cogent and indeed conclusive effect of a long continued practical construction and interpretation of a statute by administrative officers or judicial officers, see

United States v. *Hermanos y Compania,* 209 U. S. 337, 339;
Robertson v. *Downing,* 127 U. S. 607, 613;
United States v. *Falk,* 204 U. S. 143, 152.

Our investigation of the practice in the second circuit and in the other circuits where, and at the times when, these orders were made by the Senior Circuit Judges shows (and this Court because of its familiarity with judicial history may take judicial notice), that at all such times there was among the Judges of the District Court an agreement or a practice whereby district judges held different parts of court and divided the court's business between them,—one of these parts being a part assigned by the practice of the Court to deal with the class of cases which would include the specific case to which the Senior Circuit Judge had assigned himself or one of his associates.

For example, when, on January 17, 1913, Senior Circuit Judge Lacombe assigned himself to hold a District Court to determine all matters in the case of *Parsons Non-Skid Co., Ltd.* v. *Holmes, etc.* (R. 655-658), there was a part or term of the District Court presided over by a district judge to which cases of the class to which the *Parsons* case belonged were assigned by the then practice of the Court and by the then division of business by the district judges between themselves.

Nevertheless, during all that period of time no one even dreamed that such established practice and such agreement

for the division of business could restrict or limit in any way the exercise of the statutory power of the Senior Circuit Judge to designate himself or one of his associates to hear or conduct a *specific* case,—a power not only supported by the statute but by the long established practical construction and interpretation above referred to.

If that existing practice could not limit—and no one claims that it did or could limit—the aforesaid exercise of power by the Senior Circuit Judge under Sections 22 and 23, certainly these two "Rules" 1-a and 11-a cannot create or supply such a limitation.

F.

Discussions in Congress show that Section 22 of the United States Code (Section 18, Judicial Code) was considered and intended to be sufficient, where the public interest required, to authorize the designation of a Circuit Judge to conduct a particular case in the District Court.

In December, 1910, the discussion in the House involved the scope and legislative intent of Section 18 of the Judicial Code (now Section 22 of Title 28 of the United States Code). The following excerpts show that the chief purpose of Congress in enacting this section was to enable the Chief Justice of the United States or the Circuit Justice of any Judicial Circuit or the Senior Circuit Judge thereof to recognize that *in some specific important case* "the public interest" might require the designation of a Circuit Judge to hold a District Court.

These excerpts are taken from Vol. 46 of the Congressional Record, Part I.

At page 302:

"MR. BARTLETT of Georgia. * * * But you have, as I understand it, in this amendment to the law, in section 18, which is new, made a provision by which a circuit judge can be required to go and preside *in important cases whenever, in the judgment of the senior circuit judge, it is found necessary* to assign a circuit judge to the district court." (Italics ours.)

"MR. MOON of Pennsylvania (Chairman of the Committee). That is true; in order that this bill shall not require the creation of any additional judges and that the present judicial force of the country shall administer the business *just as it does now.*" (Italics ours.)

"MR. BARTLETT of Georgia. So that the cases will be more frequently tried in the district court by circuit judges than in many instances they are tried now?"

"MR. MOON of Pennsylvania. Fully as frequently, anyhow."

Again, at page 302:

"MR. PARKER: But the bill goes much further than that. From the beginning the courts of the United States have been on the English plan, where, *if it be an important case,* the judge of the highest court went down in order to try the case before the people in the beginning. Under these circumstances, the Supreme Court, with one of their justices assigned to the circuit, can always go to a circuit or a district court *and try a case.* The circuit judges of the circuit can also go to any district *and try a case.*"

At page 303:

"MR. MOON (Chairman of the Committee): *I will say that I think it is entirely covered by section 18.*

> My friend may think differently, and when we come to the eighteenth section let us perfect it. This is the section with reference to the designation of circuit court judges *to try cases* in the district courts. *I think it is entirely covered by that section.*" (Italics ours.)

When the bill was before the Senate on February 8th, 1911, and the repealing provisions of Section 18 Judicial Code were reached in the Senate, there was general discussion following a motion by Senator Root, of New York, to strike out Section 274 consolidating the Circuit and District Courts, 46 Congressional Record, page 2136. In the course of this discussion Senator Sutherland said, at page 2138:

> "The flexibility, however, of the whole system which permits *an interchange of judges* is not in any manner affected by this change of the law * * *."

Senator Clark, of Arkansas, a member of the Committee, said, at page 2138:

> "It will assign to their appellate functions the judges of the Circuit Court and it will reserve their right to appear upon the district bench, just as it reserves in favor of the judges of the Supreme Court of the United States *whenever an occasion of sufficient importance seems to make it necessary,* the right to sit in the Circuit Court." (Italics ours.)

The bill was passed following the discussion on that day. 46 Cong. Rec., Vol. III, page 2140.

POINT II.

"Rules" 1-a and 11-a cannot veto, or subordinate to the judgment of other judges, the exclusive and complete statutory powers conferred by Sections 22 and 23 both upon the designating judge and the designated judge.

"No rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law."

Washington-Southern Co. v. *Baltimore Co.*, 263 U. S. 629, 635.

(1) We submit that Judge Woolsey's decision amounted to a declaration that the district judges can strip the Senior Circuit Judge of the effective use of the statutory powers expressly conferred exclusively upon him by sections 22 and 23, and can nullify the powers and duties expressly imposed upon the designated circuit judge by the same sections. Indeed, Rule 11-a is frankly aimed at "*designated*" judges only. It does not apply to regularly appointed district judges.

Judge Woolsey says that the district judges have this right by virtue of the rule-making power conferred by section 731 of Title 28 of the United States Code. But that very section declares that their rule-making power shall not be exercised "in any manner" "*inconsistent with any law of the United States.*"

Are not "Rules" 1-a and 11-a, interpreted and applied as they have been by Judge Woolsey, clearly inconsistent to that extent with sections 22 and 23?

A few tests will conclusively demonstrate the inconsistency.

How can Judge Manton, as Senior Circuit Judge, effectuate his finding of the requirements of the public interest if, under Rule 1-a, the Senior District Judge refuses to assign the designated circuit judge to any work, or assigns him only to work having no relation to the public interest in furtherance of which he was appointed under sections 22 and 23?

Or how can Judge Manton, as Senior Circuit Judge, effectually designate a circuit judge "to discharge all the judicial duties for which he is so appointed" (section 23), and clothe him, for the purpose of their discharge, with "all the powers and rights" "of a judge of the district" (section 22), if under Rule 1-a the Senior District Judge can prevent his discharge of all judicial duties or at least of "the judicial duties for which he is so appointed," and can prevent his exercise of the intended "powers and rights" by assigning him to no work or to wholly unrelated work?

Or how, for example, could Judge Lacombe as Senior Circuit Judge have effectively designated himself to hear all applications in equity in the *Pennsylvania Steel Co.* case, if the district judges by a rule like Rule 11-a could have directed that all such applications must be heard by some other judge or in some other courtroom?

Or how can the judicial duties which the designated circuit judge is to discharge spring from the terms of his appointment by the Senior Circuit Judge as provided in section 23, if judicial duties in the district court are to be exercised only upon designation of the Senior District Judge, or if the district judges by agreement among themselves can assign to a district judge the very judicial duties to which the circuit judge was appointed?

The famous declaration of Chief Justice Marshall that "the power to tax is the power to destroy," may be pertinently paraphrased here. The power of the Senior District Judge under Rule 1-a to say what work shall be done is the power to say that no work shall be done.

(2) Judge Woolsey declares that the district judges "must, within the law, be masters in their own house" (R. 700-701); that Judge Manton's action was that of an intruder, and that his procedure in the district court was wholly irregular (R. 720).

These very statements illustrate, we submit, the extent to which his decision nullifies the powers, rights and duties of the designating and designated judges under sections 22 and 23; and, therefore, they emphasize the illegal effect which he has given to Rules 1-a and 11-a. They squarely abrogate the exclusive or supervisory power in the public interest which sections 22 and 23 give to the Senior Circuit Judge; and they abrogate the power of the designated circuit judge "to discharge all the judicial duties to which he is so appointed" under section 23 by the Senior Circuit Judge in the furtherance of the requirements of the public interest as found by the latter. If these express statutory powers of the Senior Circuit Judge and of the designated circuit judge are to be, or should be, abrogated, the abrogation must be by act of Congress and not by the rule-making power of district judges.

(3) At another point Judge Woolsey says, in effect, that the designated circuit judge does not acquire "such a status in the District Court as to give him a right to participate in the division of business of the District Court, or in its rule-making" (R. 708).

And elsewhere Judge Woolsey says (R. 717):

> "The whole matter may be summed up by saying that when a Circuit Judge is designated to hold a District Court and proceeds to sit therein, he is acting as a District Judge and must obey its rules."

But suppose its rules are in effect designed—as Rules 1-a and 11-a obviously are—to keep circuit judges out of the district court except in connection with business (if any) designated by the Senior District Judge instead of by the Senior Circuit Judge, or designated by the district judges through the device of dividing the court's business among themselves! Can such rules be valid and effective, without reducing to an empty shell and a mockery Sections 22 and 23?

Compare Judge Woolsey's above-quoted declaration that the designated circuit judge has no power to participate in the division of business of the district court or in its rule-making power, with the express declaration of Section 22 that the circuit judge so designated "shall have all the powers and rights" "of a judge of the district."

Compare Judge Woolsey's above-quoted statement that the designated circuit judge has no power as to rules except to "obey" those already made, with the express declaration of Section 22 that the only power of a district judge which the designated circuit judge shall *not* have is "the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds." The very statement in the section of these three exceptions to equality of power demonstrates the all-inclusive character of the intended equality in all other respects.

Suppose there was but one district judge in the district—and there are many such districts. Is it thinkable that

such sole district judge by promulgating rules like 1-a and 11-a could cut the designated circuit judge out of all function, or out of all those which the sole district judge might choose to keep for himself? If so, what becomes of the express declaration in Section 23 that "all the acts and proceedings in the courts held by" the designated circuit judge, "in pursuance of said provisions" of Sections 22 and 23, "shall have the same effect and validity as if done by or before the district judge of said district"?

(4) Judge Woolsey refers repeatedly to "orderly judicial procedure." But, the only "orderly judicial procedure" is the procedure prescribed by law; and no district judge has the authority to denounce or nullify the procedure prescribed by Sections 22 and 23 on the ground that it prevents the district judges from being the sole "masters" in the "house" of the district court or otherwise. The district judges have no power to expel from the doors of this "house," or to admit only on sufferance, those other judges from a higher court upon whom Congress has conferred an equal right of habitation when "the public interest requires."

Judge Woolsey says that the designated Circuit Judge "does not carry with him down to the District Court any appellate attributes which put him *above* the other District Judges" (R. 717) (italics ours). No one claims that he does. What we do claim is that Judge Woolsey's decision puts the designated circuit judge *below* and under and at the mercy of the district judges; and that, in addition, it nullifies the functions of such designated circuit judge and of the Senior Circuit Judge as prescribed in Sections 22 and 23.

Sections 22 and 23 are a full and *complete* grant of power both to the designating and to the designated judge. Judicial authority can be exercised thereunder irrespective of any other grant of power. Hence so-called rules of the District Court can no more subtract from that authority than they could add to it.

POINT III.

Moreover, "Rules" 1-a and 11-a are invalid for all purposes.

Section 731 of Title 28 of the United States Code provides as follows:

> "RULES OF PRACTICE IN DISTRICT COURTS. The district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under section 730 of this title, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings" (R. S., §918).

Section 730 of Title 28 of the United States Code, referred to in the foregoing Section 731, provides as follows:

> "REGULATION OF PRACTICE OF DISTRICT COURTS BY SUPREME COURT. The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the

> modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the district courts" (R. S., §917).

Under Section 730 the Supreme Court promulgated the rules of practice in equity cases for all Federal courts on November 4, 1912. These are known as the Equity Rules of the United States Supreme Court. Equity Rule 79 provides as follows:

> "RULE 79. ADDITIONAL RULES BY DISTRICT COURT. —*With the concurrence of a majority of the Circuit Judges* for the circuit, the District Courts may make any other and further rules and regulations *for the practice,* proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same" (Italics ours).

Rules 1-a and 11-a were each promulgated by the District Court as "a General Rule of this court."

That they never had received the concurrence of a majority of the Circuit Judges for the circuit is conceded and asserted by Judge Woolsey, one of the authors of these "Rules" (R. 714).

A.

"Rules" 1-a and 11-a, if rules at all, are rules governing practice, proceedings and/or process in equity, and are invalid since they have not been concurred in by a majority of the Circuit Judges in conformity with Supreme Court Equity Rule 79.

(1) What is a rule in equity? Section 730 supplies the answer. That section, after referring to forms of writs and other process, to the "modes" of framing and filing proceedings and pleadings, of the taking and obtaining of evidence, of the obtaining of discovery, of "*proceedings to obtain relief,*" and of the making of decrees, includes, within its scope, the general power to make rules and

> "* * * to *regulate the whole practice* to be used in suits in equity * * *" (Italics ours).

These words "the modes of proceeding to obtain relief" in equity, and the further words "to regulate the whole practice" in equity, not only include specifically *applications for* the appointment of receivers as one of "the modes of obtaining relief" in equity, but also include whatever of "the whole practice" in equity is not specifically covered by the specific matters mentioned in the section. They are completely comprehensive of any matter of practice concerning or affecting the administration or conduct or hearing of suits in equity.

Hence they are of necessity a statutory definition of a rule in equity; and by the statute the power to make rules in equity, so defined and with such content, is exclusively conferred upon the Supreme Court of the United States.

This interpretation is further confirmed by the sub-title of that section, which reads:

> "Regulation of *Practice* of District Courts by Supreme Court" (Italics ours).

Thus both by the content of the section and by its sub-title any rule concerning or affecting "the mode of proceeding to obtain relief" in equity (as, for example, applying for receivers) or concerning or affecting any other matter of "practice" in connection with an equity case, is an equity rule within the meaning of the statute.

This definition, of course, controls the meaning of the term "Equity Rules" as used by the Supreme Court in its formulation of rules under that name. The official title of this formulation is "Equity Rules of *Practice,*" and the comprehensive character of that term and of the content of the rules embraced in the Supreme Court's formulation of Equity Rules is shown by final Equity Rule 81, which declares:

> "These Rules shall be in force on and after February 1, 1913 and shall govern *all proceedings* in cases then pending or thereafter brought" (Italics ours).

Of necessity this language of the Supreme Court demonstrates that it meant that any proceeding in any cause in equity was governed by the practice of the Federal Courts in equity and hence by the content, restrictions and meaning of the "Equity Rules."

(2) It is quite true that the Equity Rules do not specifically set forth a practice for each proceeding in an equity cause. They themselves expressly recognize a residuum

of subject matter not covered by the specific rules; and as to that residuum they provide in Rule 79 that, *with the concurrence of a majority of the Circuit Judges,* the district courts

> "may make any other further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed."

Not only could language not be more comprehensive but language could not more definitely convey the conception of the Supreme Court that *any rule or any regulation* of a district court which affected the practice or the proceedings or process, mesne or final, in an equity cause, rested for its authority and validity on Section 730 (governing the practice in equity causes) and on the power thereby delegated by Congress to the Supreme Court and by the Supreme Court through Equity Rule 79 to the District Courts subject to "concurrence of a majority of the Circuit Judges."

Mesne or interlocutory proceedings and process have been defined in *Horn* v. *Pere Marquette R. Co.,* 151 Fed. 626. The court said at page 636 concerning practice in equity:

> "When there is no settled *practice* to guide a judge, the limitations upon his powers at chambers must be found in the distinction between those steps, in an equity cause, which tend to prepare the cause for hearing or preserve the subject-matter until such a hearing, and those judgments which adjudicate the ultimate merits. That which does not adjudicate the merits is interlocutory. Mr. Daniel defines an 'interlocutory application' as 'a request to the court or to a judge at chambers, for its interference in a matter arising in the progress of a cause or pro-

> ceeding; and it may either relate to the process of the court, or to the protection of the property in litigation *pendente lite,* or to any matter upon which the interference of the court or judge is required before, or in consequence of a decree or order'."

The same decision squarely holds that an application for the appointment of a receiver is an interlocutory proceeding in equity (p. 637).

> "If Mr. Daniel's definition of an interlocutory order is correct, and we see no reason for doubting it, *an application for a receiver pendente lite* is plainly within any reasonable interpretation of the third *rule in equity.*" (Italics ours.)

(3) "Rule" 1-a in so far as it purports to limit the exercise of equity jurisdiction by a *designated* judge, and "Rule" 11-a in so far as it purports to tell one seeking the appointment of equity receivers, where and before whom to apply, clearly affect not only the "practice," but also "proceedings," in an equity cause and also affect mesne "process" in an equity cause, and hence fall squarely within the very terms of Equity Rules 79 and 81 and therefore within the requirement that there should be *concurrence by a majority of the Circuit Judges.*

"Rule" 11-a possesses all these characteristics *eo nomine.* It is expressly directed to "all applications for the appointment of receivers *in equity causes*" (italics ours), and requires that such applications shall be made to the judge assigned to hold the motion part of the business of the court and to no other judge. If this is not a "regulation of practice" in an equity cause, such a phrase can have no meaning. The appointment of receivers (except in bankruptcy) is an exclusive function of an equity court.

Indeed, it is one of its outstanding functions. Furthermore, the application for the appointment of a receiver in an equity cause is of necessity and *eo nomine,* a "proceeding" in an equity cause. Still again, inasmuch as such an application is granted (if granted at all) by an order which in connection with the appointment of temporary receivers requires the parties in interest to show cause at a given time why the receivership should not continue, the application is of necessity and *eo nomine* an application for "mesne process" in an equity cause. In other words, *the application dealt with in "Rule" 11-a falls within all three categories mentioned in Equity Rule 79,* and must therefore of necessity be governed by the requirement that, whether regarded as a "rule" or regarded as a "regulation," it can have no validity *without the concurrence of a majority of the Circuit Judges.*

Furthermore, "Rule" 11-a purports to govern a "mode of proceeding to obtain relief" in equity (*to wit,* the mode of proceeding to obtain the relief of the appointment of a receiver in equity), and therefore by the very terms of Section 730 again purports to be a rule in equity.

This is equally true with respect to "Rule" 1-a in so far as it purports to limit the exercise of equity jurisdiction by a *designated* judge. That "Rule" necessarily governs and controls the most supreme of all matters of practice in an equity cause,—the method and manner of determining the Chancellor to hold the equity cause. The "Rule" by its terms enables the Senior District Judge not only to prevent any judge designated to sit in the District Court from entertaining or hearing any equity cause or any application in an equity cause, but it also enables the Senior District Judge to prevent parties seeking relief in equity from applying to any such judge.

Since, by Sections 19, 20, 21 and 22 of Title 28 of the United States Code (Judicial Code, Sections 15, 16, 17 and 18), judges designated to sit in the district court "have all the powers and rights" and perform "all the judicial duties for which" they are so appointed, each judge so designated has power and jurisdiction to hold an equity court, try equity causes and hear applications in equity. Hence, any rule which purports to limit, suspend or destroy the exercise of that power on his part is of necessity a rule or regulation which purports to govern the "practice," the "proceedings" and the issue of "process" in equity suits within the meaning of Section 730 and of Equity Rules 79 and 81, *and therefore would require for validity the concurrence of a majority of the Circuit Judges.*

(4) On the one hand, Judge Woolsey in order to denature Rule 11-a as an equity rule diminishes it to a mere direction to litigants, a mere signpost pointing "to the door of the room" where particular business is to be done (R. 714). He refers to it as only "a calendar rule" (R. 876).

On the other hand, Judge Woolsey in order to denature Judge Manton as a judge and a judicial officer clothed with statutory jurisdiction magnifies Rule 11-a into substantive law exclusive of all other power and practice. He refers to it as having "the juridical status of statutes" (R. 713), and as rendering the orders of Judge Manton *coram non judice* (R. 720).

(5) There are many other considerations which reinforce this view. Section 41 of Title 28 of the United States Code prescribes that "a District Court shall have original

jurisdiction as follows: of all suits of a civil nature at common law or in equity." In consequence, when Section 22 authorizes a Senior Circuit Judge to designate any Circuit Judge "to hold a District Court," the section necessarily means that such Circuit Judge so designated is empowered to hold a court having original jurisdiction of all suits in equity as prescribed in Section 41. Hence, any rule adopted by District Judges which impairs, destroys or makes conditional the exercise by such a designated judge of the original jurisdiction in equity thus conferred upon him by express terms of the statute, is not only an unauthorized limitation of substantive law, but is certainly an attempt to regulate practice in equity, to govern proceedings in equity, and to limit the sources from which mesne process may issue in equity.

A rule which thus takes away from a designated Judge the right to exercise any power in equity (except by and with the consent of another judge and at the latter's pleasure) necessarily takes away all the *practice* in equity which would otherwise attach to such a designated judge holding a district court, for "the tail must go with the hide."

(6) The insertions of "Rules" 1-a and 11-a within the so-called "General Rules" of the Southern District, cannot change their essential nature as rules or regulations affecting practice, proceedings and process in equity.

This essential nature is made the more manifest by a glance at the subject-matter of those rules which this District Court has itself classified under the heading of "Equity Rules" *for which the concurrence of a majority of the Circuit Judges has heretofore been obtained.*

Thus, in Rule 4 of the Equity Rules of the Southern District of New York there is a provision that a judge who has appointed a receiver in equity shall thereafter hear all subsequent matters in that cause. Why can such a rule be an equity rule, and yet a rule which requires applications for the appointment of receivers to be made before the judge holding the Motion Part, not also be an equity rule? Why is one rule a regulation of equity practice and proceeding, and the other not?

So, likewise, Rule 4 of the Equity Rules of the Southern District further prescribes:

> "Petitions for the appointment of a receiver * * * and motions or petitions for orders upon merely administrative or routine matters may, in his (the judge's) discretion, be heard by him *ex parte*, and except that motions or petitions as to merely routine matters, if contested, may be heard on notice in the General Motion Part, or, if uncontested, may be heard *ex parte*, by the judge assigned to hold that part."

Surely, this regulation designated by the District Court itself as an equity rule is in no different category than "Rule" 11-a. They both relate expressly to the same subject-matter, to wit, the identity of the judge and the identity of the place where an application in equity for the appointment of a receiver shall be made.

Furthermore, Rule 4 of the Equity Rules of the Southern District provides:

> "If the Judge who appointed the receiver be disqualified in a particular matter, or if he be no longer in office or be ill, incapacitated or absent from the District, *the Senior District Judge* (or if he be ill,

incapacitated or absent from the District, the then acting Senior District Judge) shall act or *designate another Judge* to act in the cause temporarily or during its further progress, as occasion may require." (Italics ours.)

By what process of casuistry can such a rule be characterized or classified as an equity rule, and yet "Rules" 1-a and 11-a be said not to be equity rules?

(7) Judge Woolsey states in his opinion that "Rule" 11-a "simply points to the door of the room where applications for receiverships must be made" (R. 714). It is submitted that the entire purpose of Equity Rule 4 of the Southern District is *also* simply to "point to the door" where various applications may be made; and yet the district judges showed their recognition of it as a true rule in equity by submitting it to the circuit judges for concurrence.

(8) Further, Judge Woolsey states that "Practice in equity in receivership cases only commences *after* the making of the order of appointment, which, in consent cases, is analogous to the issuance of process, for then only does an equity receivership based on consent begin." (R. 714.) (Italics ours.)

We submit that in any such case both the practice and the cause begin with the filing of the bill and the securing of equity process or the voluntary appearance of the defendant, and that the appointment of the receiver is a proceeding in the cause after its commencement. Moreover, we submit that a proceeding to obtain the appointment of receivers is a "mode of proceeding to obtain relief" in equity, and, therefore, squarely within the definition and precise subject matter of an equity rule as defined by Section 730.

Any appointment of receivers in equity presupposes an existing cause, for the appointment itself is merely an *interlocutory* proceeding and order in a pending cause. Hence, the practice in such a cause in equity began when the cause began; and the application for receivers therein was part of the interlocutory practice in equity in that cause.

In *Horn* v. *Pere Marquette R. Co.*, 151 Fed. 626, the action was commenced by the filing of a bill asking for the appointment of a receiver. The defendant appeared and consented to the appointment of a receiver. At page 634 the court used the following language, which is a complete answer to Judge Woolsey's astounding statement that in equity receivership cases "practice only commences *after*" the appointment:

> "An order appointing a receiver made at chambers, like an order allowing an injunction or other interlocutory order, *presupposes a pending case.* The objection that there was no pending suit when the order in this case was made is a misconception." (Italics ours.)

B.

If it be contended that "Rules" 1-a and 11-a were authorized by Section 27 of Title 28 of the United States Code, they could have no binding effect upon Judge Manton who in no way participated in their adoption.

Moreover, Judge Woolsey admitted that they had not been adopted under authority of that section.

Section 27 of Title 28 of the United States Code (Judicial Code Section 23) reads as follows:

> "DISTRICT WITH MORE THAN ONE JUDGE; DIVISION OF BUSINESS. In districts having more than one dis-

> trict judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district."

(1) Judge Woolsey, in his opinion, stated that it was pursuant to the power vested in the District Court by Section 731 (not Section 27) that it claimed to have made and promulgated "Rules" 1-a and 11-a (R. 713). Since he participated in the adoption of these "Rules," he must be deemed to speak on this subject from personal knowledge.

Judge Woolsey's holding to this effect was foreshadowed by his statements as contained in the following colloquy which took place on the argument (R. 888-890).

> "Mr. Tuttle: * * * I am not quite clear whether I gathered from your Honor's remark—to take up another angle of this matter—whether I gathered from your Honor's remark this morning that you thought these so-called Rules 1-a and 11-a were passed under authority of Section 27 relative to the division of business?
>
> "The Court: *Oh, not at all.*"
>
> * * * * * *
>
> "Mr. Tuttle: Well, then, I understand your Honor's position to be that Rules 1-a and 11-a are not to be supported under that particular section.
>
> "The Court: *Under division of business, I do not think that has anything to do with rule making under the law.*
>
> "Mr. Tuttle: Then I assume your Honor's position is that the authority for them, as rules, would fall under Sections 731 and 730 of the statute deal-

ing with rules of practice in District Courts and the regulation of practice in District Courts by the Supreme Court. Otherwise——

"The Court: *Yes, absolutely.*"

(2) Moreover, it is quite obvious that "Rules" 1-a and 11-a cannot, as Judge Woolsey thus conceded, be deemed authorized by Section 27.

Section 27 confers no power to make permanent "General Rules," as these are called. That power is fully dealt with in Section 731; and that Section is clearly designed to be exclusive and to exhaust the subject. Section 27 deals solely with *agreements* between the individual judges themselves to divide business from time to time. It would cover current arrangements among the judges as to what particular judge shall sit at a particular part of the Court at a particular time. It would not cover a permanent rule that business of a particular class shall be conducted at a given part.

Only three constructions of Section 27 are possible:

1. That in districts having more than one *regularly appointed* district judge, *the regularly appointed* district judges may agree upon a division of all the business and the assignment of all the cases for trial in the district, without regard to any *designated* judge or judges acting under sections 22 and 23 of Title 28, and that these latter judges must be bound by any division agreed to by the *regularly appointed* district judges.

2. That in districts having more than one *regularly appointed* district judge, the *regularly appointed* district judges may agree upon the division of business and assignment of cases for trial as between themselves, but without any effect on the

jurisdiction, rights, powers or duties of a *designated* judge or judges acting under sections 22 and 23.

3. That in districts having more that one district judge, whether by regular appointment or such designation, those judges may agree upon the division of business and assignment of cases for trial.

We submit that the first construction is absurd. It would result in the right of the *regularly appointed* district judges to strip any designated judge, whether appointed by the Chief Justice, the Circuit Justice or the Senior Circuit Judge, of all powers, although in case of designations under Section 22 the statutes specifically provide that the designated judge "shall have all the powers, and rights, and perform all the duties, of a judge of the district, * * *" (Section 22) and be obligated "to discharge all the judicial duties for which he is so appointed * * *" (Section 23).

In *Harmon* v. *United States,* 43 Fed. 817 (1890), the court held in effect that the designated judge had the same status as the regularly appointed judge.

Certainly Section 27, which as shown above, is open to two other constructions, both more reasonable, cannot be so construed as to be inconsistent with Sections 22 and 23 and the prior sections of Title 28 of the United States Code giving powers to judges designated pursuant thereto. Certainly it is not jurisdictional. The jurisdiction of the *court* remains the same, however the *judges* may agree among themselves to divide the work of the court. The jurisdiction of the designated *circuit* judge "to discharge all the judicial duties for which he is so appointed" remains the same, however the *district* judges may agree among themselves upon a division of their respective work.

(3) Judge Woolsey states in his opinion:

> "Judge Manton's second order of August 25, 1932, which I shall call the Division of Business Order, involved an attempt to get around General Rule 11-a which requires all applications for receiverships in equity cases to be made only to the Judge assigned to hold the Bankruptcy and Motion part of the business of the Court and to no other Judge."

On the contrary, it was "Rule" 11-a itself, we respectfully submit, which was the actual and certainly the original "attempt to get around" something, to-wit, to get around and circumvent the authority of the Senior Circuit Judge under sections 22 and 23 of Title 28. Judge Manton by his second order of August 25th merely registered his protest against that attempt and his determination that it was ineffective.

Judge Manton's jurisdiction was fully established by his Designation Order. That order was in itself ample foundation for all later interlocutory orders in the cause. Evidently, out of an abundance of caution, he made the Division of Business Order so that there could be no possible inference that he in any way agreed to or recognized himself as bound by "Rules" 1-a and 11-a.

POINT IV.

Judge Woolsey had no power to vacate orders made by Judge Manton in the Brake Shoe suit for the further reasons (1) that Judge Manton's status in that suit was at least that of a judge *de facto* and his acts as such could not be reviewed in the Johnson suit or by a judge of coordinate jurisdiction, and (2) that the orders made by Judge Manton in the Brake Shoe suit were not open to collateral attack.

"Rules" 1-a and 11-a, if they can have any validity at all, are merely directory. They cannot strip any judge of the authority and power conferred by statute. They cannot render Judge Manton a mere "usurper."

We submit that Judge Manton was, for all of the purposes of the Brake Shoe suit, a *de jure* judge; but in any event he was, for the purposes of that suit, at least a *de facto* judge.

(1) In the Brake Shoe suit the status of Judge Manton had back of it the following predicates:

(a) A statute authorizing the Senior Circuit Judge of a Circuit to designate and assign any Circuit Judge of his Circuit to hold a District Court within his Circuit, if the public interest requires, and giving to a Circuit Judge so designated "all the powers and rights" of a judge of the district and requiring him to perform all the duties of such a judge (Section 22).

(b) A judge acting as a Senior Circuit Judge in the Second Judicial Circuit and duly authorized so to act.

(c) A duly made order of such Senior Circuit Judge containing a finding that the public interest required that Judge Manton be designated and assigned as a Circuit Judge to hold a District Court within the Second Circuit and designating and assigning Judge Manton to hold a District Court for the Southern District of New York and particularly to hear and determine all applications and proceedings in the Brake Shoe suit (the Designation Order). The application of plaintiffs in the Johnson suit for the vacation of this order was denied by the Court below for want of jurisdiction, and that portion of his order was never appealed from by the present petitioners.

(d) A statute which provides that it shall be the duty of any Circuit Judge so designated "to discharge all the judicial duties for which he is so appointed" (Section 23).

(e) A suit (the Brake Shoe suit) over which, and over the subject matter of which, the District Court for the Southern District of New York had competent jurisdiction by reason of the necessary diversity of citizenship and the amount involved. Judge Woolsey in his opinion finds this to be a fact (R. 712).

(f) Parties over whom in said suit the District Court for the Southern District of New York had personal jurisdiction. Judge Woolsey found this to be the fact in his opinion (R. 712).

(g) A consent by all the parties to said suit to the jurisdiction of Judge Manton in the suit.

(h) Judicial action taken by Judge Manton in the Brake Shoe suit pursuant to the provisions of the Designation Order.

Thus all conditions required to make Judge Manton at least a *de facto* judge in the Brake Shoe suit are present,

i. e., a duly constituted court, a duly instituted suit, jurisdiction in the court over the subject matter and the parties, and the exercise therein by Judge Manton, acting and purporting to act as judge of the court, of judicial powers under color of the direction and authority contained in the Designation Order.

(2) The status of a *de facto* judge cannot be attacked collaterally either in the suit in which he is acting or in any other suit. His right to hold his office can be questioned only in proceedings, regularly instituted for that purpose, to which he is a party, in the form provided by law.

The acts of a *de facto* judicial or other officer are as valid and binding in all respects as if he were a *de jure* officer. The officer may be ousted from holding his office and thus prevented from performing any future acts. But if he is a *de facto* officer, then any acts he has already performed cannot be assailed except for such irregularities or errors as would make those acts assailable had he been a *de jure* officer.

In *33 Corpus Juris* (p. 933) it is said:

> "*Judge de Facto.* A judge *de facto* is a judge *de jure* as to all parties except the state, and his official acts, before he is ousted from office, are binding on third persons and the public. *His right to hold his office can be questioned only in proceedings, regularly instituted for that purpose, to which he is a party,* in the form provided by law; it cannot be attacked in a collateral proceeding. *Nor can his title be determined in an action tried before him; nor in certiorari proceedings; nor on an appeal.* The rules apply, although the person acting as judge is incapable of holding the office, and irrespective of the

> question whether he was properly elected, or whether he is holding two incompatible offices." (Italics ours.)

Directly in point are many authorities which are controlling:

Ball v. *United States,* 140 U. S. 118 (1891). This was a writ of error from *a judgment sentencing defendants to be hanged.* The facts were as follows:

Judge Sabin, the regular District Judge for the Eastern District of Texas, could not hold court during the year 1889, because of illness. Judge Boarman (the District Judge for the Western District of Louisiana), purporting to act under the Circuit Judge's appointment, held the October, 1889, term of the Circuit Court at Paris, Texas. No record of his appointment appeared on the minutes of the court in the clerk's office at Paris. *The statute under which the Circuit Judge made the designation did not confer the power to designate a judge from another state in case of a vacancy.* Judge Boarman also held the April, 1890, term of the same court (Judge Sabin having died in the meanwhile), notwithstanding that he was not designated to hold any term in Texas in 1890. At this April term the defendant was convicted before Judge Boarman.

This Court held that, as to the April, 1890, term, Judge Boarman was at least a judge *de facto,* if not *de jure.* As such, his acts were not open to collateral attack even in the very litigation in which his said acts were performed. This Court said (at p. 128):*

> "We are of opinion that the irregularities alleged did not place Judge Boarman, in holding the October term, in any other position than that of a judge *de*

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* The conviction was reversed on other grounds.

> *jure,* and that as to the April term, he was judge *de facto* if not *de jure,* and his acts as such are not open to collateral attack. *Norton* v. *Shelby County,* 118 U. S. 425; *In re Manning,* 139 U. S. 504; *Clark* v. *Commonwealth,* 29 Penn. St. 129; *Fowler* v. *Beebe,* 9 Mass. 231; *Commonwealth* v. *Taber,* 123 Mass. 253; *State* v. *Carroll,* 38 Connecticut, 449; *Keith* v. *State,* 49 Arkansas, 439; *People* v. *Bangs,* 24 Illinois, 184."

McDowell v. *United States,* 159 U. S. 596 (1895). There Judge Seymour of the Eastern District of North Carolina was designated by the circuit judge to hold the February, 1894, term in the Western District of South Carolina, the regular judgeship in that district being vacant. He did so until, in the middle of February, the newly qualified judge for the district took over the term. The defendant who was convicted during the remainder of that term contended that the circuit judge had no power to designate Judge Seymour to hold the February term; that in consequence that term had never been lawfully instituted or lawfully kept alive by Judge Seymour; and that, since no special term had been called, the new judge could not lawfully hold the balance of the non-existent or lapsed February term. In overruling this contention, this Court (pp. 601-2) stated:

> "But whatever doubts may exist whether the order of designation by the Circuit Judge was within his power, there is another *consideration which is decisive of this case. Judge Seymour must be held to have been a judge de facto, if not a judge de jure, and his actions as such, so far as they affect third persons,* are not open to question. Ball* v. *United*

* It is here to be noted that the defendant himself was considered a "third person," that is, even an attack by a party to the action upon the power of the *de facto* judge is collateral and will not be heard.

States, 140 U. S. 118, 129; *Norton* v. *Shelby County,* 118 U. S. 425; *Hunter's Adm'r* v. *Ferguson's Adm'r,* 13 Kansas 462."

In *State ex rel. Buisson* v. *Lazarus,* 33 La. Ann., 1425, the constitution of Louisiana established a court with a number of judges, and provided that the judge to whom the cause was assigned should alone have the power of rendering judgment on the merits of the case except in specified contingencies. A cause not within any of the excepted contingencies was decided by a judge *to whom it had not been assigned.* It was there held that the judge exercised "if not the powers of a judge *de jure,* at least those of a judge *de facto.*"

Luhrig Collieries Co. v. *Interstate Coal & Dock Co.,* 287 Fed. 711 (C. C. A., 2nd, 1923), *certiorari* denied 262 U. S. 751. Receivers had been appointed for the defendant on a creditor's bill. *All the orders in the suit had been made by a circuit judge at a time when there was on file no designation of that judge to sit in the District Court for the Southern District of New York, in which the action was brought.* In dismissing an appeal from the order denying the motion to vacate these orders, the Court said, *per curiam,* at page 713:

> "The interest of appellant in this litigation began with its bid; it has no other [illegible] the suit. All the orders made without designation by the [illegible] Judge above referred to were prior to any right on the part of appellant to be heard in this cause. Therefore it has no right to complain about orders made before its rights accrued, but *in any event the orders were made by a de facto judge and cannot be assailed collaterally. Ball* v. *United States,* 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377." (Italics ours.)

(3) If an attack could not be made in the Brake Shoe suit itself, and this fact has been clearly demonstrated, it follows of necessity that it cannot be made in another case (the Johnson suit). The authorities on this subject are likewise ample.

In re Manning, 139 U. S. 504 (1891). This was a writ of error to review a judgment of the Supreme Court of Wisconsin denying Manning a writ of *habeas corpus* to discharge him from a sentence of the municipal court for Ashland County. On his behalf it was claimed that the sentencing judge's appointment to the municipal court by the governor was invalid and void. In affirming a denial of the writ, this Court said (p. 507):

> "It must, therefore, be taken as conclusively settled that by the law of Wisconsin, at the time of the trial and sentence of the petitioner, the court in which he was tried and sentenced was a court *de jure,* and the judge who tried and sentenced him was at least judge *de facto,* and the sentence itself was valid; and there is no ground on which this court can hold that sentence, or the imprisonment under it, to be a violation of the Constitution of the United States. *Norton* v. *Shelby County,* 118 U. S. 425; *In re Graham,* 138 U. S. 461; *In re Duncan,* 139 U. S. 449."

This Court thus decided that *habeas corpus* was a collateral attack within the meaning of the rule that a collateral attack cannot be made upon the judgment or orders of a *de facto* judge.

Ex parte Henry Ward, 173 U. S. 452 (1899). Ward was convicted before Judge Meek who had been appointed to fill an alleged vacancy caused by the death of Judge Rector. Ward contended that Judge Meek's appointment was void,

because under the statute Judge Rector's death terminated the office and left no vacancy, and because the Senate, which was sitting when the appointment was made, had not given its consent.

In denying Ward leave to file a petition for a writ of *habeas corpus,* Mr. Chief Justice Fuller, writing for the unanimous court, said at page 454:

> "We need not, however, consider the elaborate argument of counsel, in this behalf, since we regard the well settled rule applicable here that where a court has jurisdiction of an offence, and of the accused, and the proceedings are otherwise regular, a conviction is lawful although the judge holding the court may be only an officer *de facto;* and that the validity of the title of such judge to the office, or his right to exercise the judicial functions, cannot be determined on a writ of *habeas corpus.*"

(4) The plaintiff Boehm, intervenor in the Johnson suit, endeavors to differentiate the cases above set forth on the ground, erroneous in point of fact, that in those cases the parties had consented to the jurisdiction of the particular judge.

But the parties to the Brake Shoe suit *consented* to the jurisdiction of Judge Manton, and no single objection was made by a party to that suit. Hence, as we submit, Mr. Boehm's contention leads to the extraordinary conclusion that, as to the parties to the Brake Shoe suit who had consented to the jurisdiction, Judge Manton was sitting in the suit as a *de facto* judge, but as to the plaintiffs in the Johnson suit, he was a mere usurper.

(5) *Case* v. *United States,* 14 Fed. (2d) 510, decided by the Circuit Court of Appeals for the Eighth Circuit and

cited by Judge Woolsey in his opinion, is readily distinguishable. There the Circuit Court of Appeals upset the conviction in a *habeas corpus* proceeding on the ground that no man could be lawfully tried criminally by a court having no jurisdiction in the territory where the offense was committed. Obviously that case in no way parallels the present. If a judge sitting in the Southern District of New York undertook to try a defendant for an offense committed only in the Eastern District, his action would not merely be irregular as violative of some rule of practice or principle of procedure but would be wholly without jurisdiction at all and violative of the constitution. In other words, the *Case* case was an instance where the Court itself was without jurisdiction, and not an instance such as the present where the Court's jurisdiction was not in issue but merely the identity of the proper judge to hear the matter.

Further reasons showing the irrelevancy of the *Case* case are stated in the opinion below (R. 1031).

POINT V.

In addition, a disregard of a rule of Court merely regulating practice or assigning business as between judges or parts of court, does not affect the jurisdiction of the Court itself and cannot subject the orders of the Court to collateral attack,—especially where the parties to the cause have themselves waived the application of the rule.

(1) A party to a cause may waive even his constitutional rights as to practice and procedure in the conduct of a cause. *A fortiori,* where disregard by both parties of a

rule of practice creates a mere irregularity, such irregularity does not make null and void the jurisdiction of the court.

Abbott v. *Brown*, 241 U. S. 606 (1916). There a defendant in a criminal action claimed that a motion for a new trial on the ground of newly discovered evidence had been invalidly granted because of violation of a District Court rule which required that such a motion had to be made within four days after the entry of the verdict. This Court held otherwise, saying (p. 609):

> "It was a mere regulation of practice and a breach of it would be, at the utmost, *a mere error of procedure, not affecting the jurisdiction.*" (Italics ours.)

In *Lively* v. *Picton*, 218 Fed. 401, the Circuit Court of Appeals said (at p. 408):

> "The objection is also made that the common pleas court violated its local rules, which are said to require notice of application for receivership, unless upon the filing of affidavit * * *
>
> "If, under the circumstances stated, the court disregarded its local rule by dispensing with affidavit, from the fact, as alleged, that the verification of the petition was only upon information and belief (as is permitted under sections 11351 and 11354 of the General Code of Ohio), *jurisdiction to appoint the receiver was not thereby lost.* The dispensing with notice or affidavit on personal knowledge was matter of judicial discretion, an abuse of which would be reviewable directly *but not collaterally.*" (Italics ours.)

See also:

Payne vs. *Garth*, 285 Fed. 301, 310;
People ex rel. Childs v. *Extraord. Trial Term*, 228 N. Y. 263.

This view is further supported by a series of cases in which it is held that a court may in the exercise of its discretion waive the application of certain rules in particular cases for the purpose of proper administration of justice.

Holmes vs. *Ginter Restaurant Co.*, 54 Fed. (2d) 876 (C. C. A., 1st, 1932);
Southern Pacific Co. v. *Hamilton*, 54 Fed. 469 (C. C. A., 9th, 1893);
Strohbar v. *Dwinnell*, 29 Fed. (2d) 915 (C. C. A., 5th, 1929);
Omaha Electric Light & Power Co. v. *City of Omaha*, 216 Fed. 848 (C. C. A., 8th, 1914);
United States v. *Breitling*, 20 How. 252.

(2) Moreover, where there is more than one judge in a district, and any one of them can exercise jurisdiction in a particular suit but for a rule under which that suit is assigned to another judge or part, a violation of the rule is a mere irregularity, inasmuch as the rule is merely a rule of procedure. Each judge is legally competent through inherent power to hear such suit. The violation of the rule, when waived by the parties, *does not affect the jurisdiction.*

This rule is especially applicable because by Sections 22 and 23 of Title 28 of the U. S. Code, the circuit judge designated by the Senior Circuit Judge has "all the powers

and rights'' and must ''perform all the duties'' of a judge of the district.

In *State ex rel. Hill* v. *Lichtenberg, Judge,* 4 Wash. 553, it is said:

> ''* * * The rules of said court in partitioning the business between the respective judges thereof should be upheld, as far as possible, in order to facilitate the orderly and convenient discharge of the business, and we have no doubt of the court's authority to classify and partition it as was done. However, there can be no question, notwithstanding this, but that *each judge has all the power that any other Judge of said court has to try any cause within the jurisdiction of said court, regardless of said apportionment.*'' (Italics ours.)

In *Foley* v. *Utterback,* 196 Iowa 956, the Supreme Court of Iowa said:

> ''The district court is a court of general jurisdiction, and the mere division of judicial duties by agreement of the judges does not in itself deny judicial functions to any judge of that court.''

In *White* v. *Superior Court of City and County of San Francisco,* 110 Cal. 60, it was held that:

> ''Whether sitting separately or together, the judges hold but one and the same court, and the jurisdiction they exercise in any cause is that of the court, and not the individual. The division into departments is purely imaginary, and for the conveniences of business and of designation. Transferring a cause for trial or disposition from one of those departments to another does not affect a change or transfer of the jurisdiction of that cause; that remains at all times in the court as a single entity.''

This is also true, although the division of business is by statute instead of by rule.

The case of *State ex rel. Buisson* v. *Lazarus, Judge,* 33 La. Annual 1425, is a case peculiarly striking in its pertinence. There Article 130 of the Louisiana Constitution provided that a judge of the Civil District Court to whom a cause had been assigned should thereafter have "*exclusive* control of it from its inception to its final determination," subject only to disability through sickness or otherwise. In construing this provision, the Supreme Court of Louisiana held, to quote the headnote (p. 1426):

> "But the Constitutional direction is not one of public order, and does not strike with absolute nullity such a judgment when rendered by any other of the five judges. The parties to suit themselves may consent that the judgment be so rendered. Therefore, a judgment rendered by another judge than the one to whom the cause was assigned, in case writs of absence or other disability of the latter, may be valid, if no timely opposition or objection is made thereto."

The opinion in that case might well have been written in the present case. To quote (p. 1431):

> "The objection is aimed, not at the jurisdiction of the *court* as a court, but at the irregularity of the mode, or illegality of the process, by which the cause appeared before the judge and was passed upon by him. It goes to the administrative power of regulation exercised by the judge, in disposing of the suit."

In *People* v. *Barbera,* 78 Cal. App. 277, it was said:

> "* * * The trial was had in department 11 of the superior court, state of California, in and for the

city and county of San Francisco, and it is contended that this department and the judge presiding therein are not those designated by the judges of the superior court to hear cases coming under the Juvenile Court Law, in accordance with the provisions of section 16 of said law. * * *

"If it be true that this cause should more properly have been heard in another department of the superior court, the record discloses, at most, an irregularity. Graziani *v.* Denny, 174 Cal. 176, 179, 162, p. 397; Nickel *v.* State, 179 Cal. 126, 129, 175, p. 641. Whether sitting separately or together, the judges of the superior court hold but one and the same court, and *the jurisdiction they exercise in any cause is that of the court* * * *." (Italics ours.)

(3) Judge Woolsey in his opinion (R. 713) has referred to certain cases in which it is stated that a rule of court has the force of law. But granting this premise, the conclusion does not follow that a rule regulating practice, or directory in its nature, or assigning business as between Judges or parts of Court touches the *jurisdiction* of the Court itself or of the presiding Judge.

Furthermore, in the cases cited by Judge Woolsey it will be found that one or the other of the parties objected to the disregard or violation of the rule. Such cases can have no bearing upon the present instance where all parties to the Brake Shoe suit raised, and now raise, no such objection.

POINT VI.

Judge Woolsey's lack of power to make any order in the Johnson suit vacating Judge Manton's orders in the Brake Shoe suit was not affected by the Consolidation Order, since even if the Consolidation Order were proper it could not result in merging the two suits into one cause. The independent and separate existence of the two suits could not be affected by consolidation.

Moreover, Judge Woolsey could not do by indirection what he could not do by direction. Since he had no power in the Johnson suit to vacate orders in the Brake Shoe suit, he could not clothe himself with such power by forcibly reaching over into Judge Manton's court and possessing himself of the Brake Shoe suit by the alleged process of consolidation.

Furthermore, applying Judge Woolsey's own reasoning, his action was a violation of Equity Rule 4 of the Southern District of New York.

(1) In his opinion Judge Woolsey stated that there was in his mind "a residuum of doubt" whether so long as the Brake Shoe suit and the Jonhson suit remained separate causes an order could properly be made in the Johnson suit which would affect the receivership orders and the other orders made in the Brake Shoe suit (R. 710-711). Further in his opinion Judge Woolsey concludes that he could avoid such difficulty by consolidating the two suits (R. 710-711), and accordingly he made the Consolidation Order (R. 722-724).

The consolidation by Judge Woolsey of the Brake Shoe suit and the Johnson suit, even if effective, did not accom-

plish a merger of the two suits. The suits remained separate, distinct, and independent suits. The consolidation could not affect the rights of the parties in either suit. Such a consolidation is merely a procedural expedient for the sake of convenience and economy. Since the suits remained separate and independent an attempt in one of them to attack proceedings in the other is a collateral attack. The attacks on Judge Manton's orders were made by the complainants in the Johnson suit. The Consolidation Order did not make the complainants in the Johnson suit parties to the Brake Shoe suit nor to any one cause of which the Brake Shoe suit was a constituent part, and accordingly it did not give to the complainants in the Johnson suit any standing to attack the orders in the Brake Shoe suit. As said below in the opinion of Circuit Judge Hand (R. 1034):

> "Consolidation does not merge the suits; it is a mere matter of convenience in administration, to keep them in step."

The rule regarding the operation and effect of consolidation of actions in equity causes and in the Federal courts is stated as follows:

> "It is ordinarily held that the effect of a consolidation of suits in equity is different from the effect of a consolidation at law, and amounts practically to no more than a trial of the different suits at the same time. The cases preserve their separate identity, and are to be determined exactly as if they were heard separately. The consolidation does not make the parties in one suit parties to the other, or change the issues in the respective cases, or alter the rights of the parties, which must still turn upon

the pleadings, proof and proceedings in the respective cases. * * *" (1 C. J. 1137 [Actions] §353).

"In the federal courts, although the statutes expressly authorize them to 'consolidate' actions, the effect of the so-called consolidation differs from that above stated, in the case of a technical consolidation at law, and, as in the equity practice, amounts to no more than a trial of the several actions together. Under the practice in these courts each of the several actions consolidated preserves its separate identity, and while they are all tried together, each is treated as a separate action and different verdicts and judgments or decrees are rendered." 1 C. J. 1137 [Actions] §358).

In *Toledo, etc., R. R. Co.* v. *Continental Trust Co.*, 95 Fed. 497 (C. C. A. 6th, 1899) (certiorari denied 176 U. S. 219), the court, by Lurton, J., said, at page 506:

"Such consolidation is primarily but an expedient adopted for saving costs and delay. Each record is that of an independent suit, except in so far as the evidence in one is, by order of the court, treated as evidence in both. The consolidation does not change the rules of equity pleading, nor the rights of the parties, as those rights must still turn on the pleadings, proofs, and proceedings in their respective suits. *The parties in one suit do not thereby become parties in the other,* and a decree in one is not a decree in the other, unless so directed. It operates as a mere carrying on together of two separate suits supposed to involve identical issues, and is intended to expedite the hearing and diminish the expense." (Italics ours.)

To the same effect are:

Taylor vs. *Logan Trust Co.*, 289 Fed. (C. C. A.) 51, 53;

Vapor Car Heating Co. vs. *Gold Car Heating & Lighting Co.*, 296 Fed. 201;

E. A. Holmes & Co. v. *U. S. Fire Insurance Co.*, 142 Fed. 863 (C. C., W. D. Tenn., 1906), at page 866;

Nolte v. *Hudson Nav. Co.*, 11 Fed. (2d) 680 (C. C. A. 2nd, 1926), at page 682;

Adler v. *Seaman*, 266 Fed. 828 (C. C. A. 8th, 1920), at page 831;

Mutual Life Insurance Co. v. *Hillmon*, 145 U. S. 285.

(2) The orders of Judge Manton were, as we have shown in Point IV, valid whether or not Judge Manton was a *de jure* or *de facto* judge. Their validity as such was no less after than before the attempted consolidation. The "orderly procedure" upon which Judge Woolsey so much insists seems to us, with all deference, to have been grossly disrupted by the unprecedented procedure of one district judge reaching over into the court of another judge of at least coordinate, if not superior, jurisdiction and forcibly snatching away from him, under guise of consolidation, a cause which the latter judge then had pending before him, —particularly when this *tour de force* was for the avowed purpose of clothing the former judge sitting in another suit with the alleged power not otherwise possessed to vacate the orders of the latter judge in the cause then pending before the latter.

The whole procedure was, we respectfully submit, an effort to rise into power by pulling on one's own boot straps; and was wholly inconsistent, since the observation of Judge Woolsey that the district judges must be "masters

in their own house" would, if sound, apply with far greater force to the right of Judge Manton, sitting as a district court, to be master in his own court.

This use of power to consolidate, not for the purpose of mere judicial convenience and the saving to the litigants of time and money, but for the purpose of forcibly depriving a coordinate judge of further jurisdiction over a cause *sub judice* before him, is novel in the extreme and provides a precedent for judicial conflict, the uses of which in practice may be most destructive to the dignity and peace of the courts.

(3) Furthermore, applying Judge Woolsey's own reasoning, his action was a violation of Equity Rule 4 of the Southern District of New York. This Rule provides, among other things:

> "In any suit in which a receiver is appointed the Judge who appoints the receiver shall retain supervision over the cause, including appointment of solicitors and applications for allowance."

This Rule had been submitted by the district judges to the circuit judges for approval in accordance with Supreme Court Equity Rule 79, and had been approved by the circuit judges.

Judge Woolsey concedes that he had "a residuum of doubt" that in the Johnson suit, standing alone, he could make any order which would affect any of the orders made by Judge Manton in the Brake Shoe suit (R. 710-1). This doubt was surely due to the obvious considerations that those orders were not open to any such collateral attack and were valid as the exercise of power by a judge who was at least *de facto*. Quite obviously, therefore, this

Equity Rule 4, by its very terms, deprived Judge Woolsey of power forcibly to take the Brake Shoe case away from Judge Manton who had immediately followed his two orders of August 25th by the order of August 26th appointing receivers, and who had continued his term of court for the further conduct of the cause for three years (R. 225), and who, at the time when Judge Woolsey made his order, had various matters in the Brake Shoe case *sub judice* before him.

POINT VII.

The question as to whether the petitioners would have any means of reviewing the validity or propriety of Judge Manton's order appointing receivers is really irrelevant. But, even if this were otherwise, the petitioners were extended by that very order an opportunity to present to him the so-called jurisdictional points which they are now urging. They were thereby furnished a forum, the privileges of which they neglected to utilize; and any adverse determination by Judge Manton they could have presented in the Circuit Court of Appeals for review.

(1) We submit that we have shown in Point IV, *supra*, that as to third parties the orders and determinations of a *de facto* judge are not open to question on the ground that he is not a *de jure* judge.

Consequently, the question whether, as to past orders of Judge Manton, the complainant in the Johnson suit has in any form or by any means a remedy to review the said orders, is wholly immaterial to any issue in this action. If

the complainant desired to prevent future action by Judge Manton, believed by him to be illegal, his remedy was to apply for writs of certiorari, mandamus, prohibition or *quo warranto*, or possibly to appear specially or otherwise in the action and question in advance the legality of judicial acts thereafter proposed to be performed. (See Title 28, Section 377, U. S. C. A.)

In the following cases, upon application of a petitioner who was not a party to the action but who had an interest in the subject matter of the action, a writ of prohibition was granted.

> *State* v. *Calhoun*, 207 Mo. App. 149 (1920);
> *Midland Inv. Corp.* vs. *Ballard*, 101 W. Va. 591 (1926).

(2) Furthermore, it must be borne in mind that in the very order by which Judge Manton appointed temporary receivers of Interborough Rapid Transit Company on August 26, 1932, and in the subsequent order on September 6, 1932, appointing a temporary receiver for Manhattan Railway Company, he designated September 22, 1932, as a date when any creditor of either of these defendants *or any "other party in interest"* might show cause before him "why the receivership should not be continued" (R. 184, 200).

These orders were published on September 13, 1932 (R. 304), and were known to Johnson and Boehm before September 22nd, 1932, because they are referred to in the Johnson bill of complaint filed on September 21, 1932 (R. 43, 8). Thus, Judge Manton himself provided an adequate forum in which precisely the objections now made could be heard.

These orders in no way required the persons who responded thereto on the date fixed to become parties to the action or even to intervene. It expressly empowered and invited them on special or other appearance to present any reason whatever why Judge Manton should terminate or annul the receivership.

As said below in the opinion of Circuit Judge Hand (R. 1033):

> "They (Johnson and Boehm) too wished a receivership, and indeed had no objection to 'the propriety of the main proceeding,' except for the judge who was to conduct it, and the receivers appointed. As to both, they had their opportunity to appear on the return day of the rule *nisi*, September twenty-second, to ask for a removal of the cause to another judge, if the rules forbade the Circuit Judge to proceed, and for the appointment of other receivers. The bill at bar was filed on the twenty-first, a week before the decree passed continuing the receivers *pendente lite*. Nothing had happened, at least before the twenty-second, to their prejudice, and if it was wrong to proceed in the face of the rules, the objection could then have been raised."

It cannot be urged that this forum was not adequate for the reason that Judge Manton would be passing on the validity of his own judicial action. In the first place, it cannot be assumed that he would not, for that reason, give fair and full consideration to any grounds of attack which might be urged. In the second place, the presentation to himself of such objections to his order was precisely the practice urged and upheld by Judge Lacombe under identical circumstances in the *New York City Railway Company* case, 221 Fed. 440, 442.

Although the original appointments of receivers was without the giving of general notice, the temporary appointments expired with the decree, making the receiverships permanent (R. 223). Thereafter the receivers held only under that decree,—a decree, as already stated, made upon full notice to all parties including even these very petitioners (R. 1033, 1034).

(3) There is nothing in Equity Rule 37 which would prevent an appeal by a person who so presented himself in response to the invitation tendered in Judge Manton's aforesaid orders to show cause why the receiverships should not be continued.

Courts of equity frequently permit parties to appear for the special purpose of being heard upon particular questions without becoming parties to the suit or without a general intervention under Equity Rule 37 which clearly contemplates intervention as a party.

If Judge Manton's decision proved adverse, Johnson and Boehm could have appealed or could have secured writs of certiorari, mandamus or prohibition as the situation might justify.

Mitchell v. *Lay,* 48 Fed. (2nd) (C. C. A. 9), 79, 84, 85;

Blake v. *District Court,* 59 Fed. (2nd) (C. C. A. 9) 78, 79;

Kingsport Press, Inc. v. *Brief English Systems,* 54 Fed. (2nd) 497;

Wood v. *Oregon Development Co.,* 55 Fed. 901;

Christian v. *Hoe, Inc.,* 63 Fed. (2nd) (C. C. A.) 218.

In the *Blake* case, *supra,* the District Court had granted a receivership of the Oil Well Supply Company on a bill in equity filed by a creditor and consented to by the defendant,—precisely as in the present case. The petitioner in the *Blake* case was not a party to the action but claimed to be an oil "percent-holder." He sought a writ of certiorari for review of the order appointing the receiver on the ground that such order could not be validly made without notice to oil "percent-holders" who were not parties. The Circuit Court of Appeals for the 9th Circuit held that the petition for a writ of certiorari was premature, saying (p. 79):

> "If petitioner feels aggrieved by the order of the District Court appointing a receiver, *he should invoke the power of that court to correct the alleged error* before applying to this court for relief. See Mitchell *v.* Lay (C. C. A.) 48 F. (2d) 79."

POINT VIII.

The Johnson bill supplied the District Court with no jurisdiction. The plaintiff, Johnson, in his capacity as a stockholder of the Manhattan, had no standing to institute a suit for the appointment of receivers of the Interborough.

This absence of jurisdiction cannot be remedied by the intervening complaint of Lillian Boehm.

(1) The Johnson suit was brought by Johnson in a derivative capacity as a minority stockholder of Manhattan in his own behalf and in behalf of such other stockholders of Manhattan as might join in the suit and become parties thereto (by leave of court) for the benefit of Manhattan

(R. 14). As regards the defendant Interborough, the only claim alleged in the suit is that of an unsecured creditor, *i. e.*, Manhattan Railway Company.

Hence, so far as the relief sought in the Johnson suit against Interborough is concerned, the plaintiff cannot invoke the equitable jurisdiction of the Federal Court for the appointment of a receiver of the Interborough because the claim alleged is that of an unsecured creditor, and there has been no waiver from the Interborough of its defense that such creditor is without a judgment or a return of execution *nulla bona,* and has an adequate remedy at law.

The appointment of receivers of the Interborough is the very essence of the Johnson bill so far as that corporation is concerned, because there is no such thing as an action in equity merely to set aside an order granted by a coordinate judge in another suit.

(2) The lack of jurisdiction in the Johnson suit could not be cured by the intervention of Lillian Boehm as a complainant therein, or by the filing of her "supplemental" bill of complaint, because:

> (a) She could only intervene as a party plaintiff in the Johnson suit in her capacity as a stockholder of Manhattan, and not as a creditor of Interborough (R. 140).
>
> (b) She is a resident of the State of New York and, therefore, in her capacity as complainant in the Johnson suit, there is no diversity of citizenship between her and the Interborough.
>
> (c) Her own "supplemental" bill of complaint sets forth an alleged cause of action by herself and in her own right as a creditor of Interborough. Accordingly, it is improperly joined in the same suit

with the Johnson bill, which sets forth a derivative stockholder's suit in the right of the Manhattan.

(d) The cause of action set forth in her "supplemental" bill of complaint is not within the jurisdiction of the District Court because of lack of diversity of citizenship.

(e) Her status in bringing her "supplemental" bill of complaint is that of a general creditor of the Interborough (R. 96); and, as such, she has no right to proceed in equity for a receiver of Interborough until judgment has been obtained by her and execution returned *nulla bona.*

(3) It is not permissible to say that because the Interborough Rapid Transit Company in the Brake Shoe suit consented to the appointment of a receiver, this consent can be used in the Johnson suit to supply the defect of jurisdiction created by the fact that Johnson is at most merely an unsecured creditor of the Interborough.

In the case of *Pusey & Jones* v. *Hanssen,* 261 U. S. 491, 500, it was held that the reason why a particular unsecured creditor might maintain a receivership action where the defendant corporation consented, was that the defendant corporation had the right to waive this defect in the right of the particular complainant to institute the action. It of course does not follow that because the defendant corporation was willing to make such a waiver in favor of some particular unsecured creditor, it was willing to do likewise in favor of all other parties claiming to be unsecured creditors,—particularly if such claim is not conceded.

This proposition was squarely held in *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77 and 640, where a defendant consented in one action to the appointment of a receiver, but

failed so to consent in the suit of an unsecured creditor. The Court held that the latter suit should have been dismissed because of "want of equity, for it was brought by an unsecured simple contract creditor" (p. 85).

POINT IX.

The power of the Court to appoint receivers on the suit of a simple contract creditor on consent of the defendant and the claim made in the petitioners' briefs that the Brake Shoe suit was collusive, are altogether separate and distinct matters. Neither matter is presented by this record or is before this Court.

(1) The Johnson bill of complaint did not so much as ge that the plaintiff in the Brake Shoe suit was a simple contract creditor, and did not contain any charge that the proceeding was collusive or allege any facts from which collusion might be inferred. On the contrary it, like the Brake Shoe bill of complaint, alleged that both railways were in such financial straits that a court of equity must take over their assets and prevent their dismemberment by execution, attachment and the like (R. 1028). Johnson expressly alleged that "there is urgent necessity for the immediate appointment of receivers of Manhattan and Interborough" (R. 50).

As was said by the Circuit Court of Appeals in its opinion herein (R. 1028):

> "The plaintiffs, and those who have intervened, ask for receivers, just as do the parties to the American Brake Shoe Company suit. The dispute touches merely who shall be the receivers, and who the judge to have charge of the receivership."

So, likewise, there is no allegation or charge of collusion in the intervening bill of complaint filed by Lillian Boehm. On the contrary, that bill expressly alleges that the appointment of a receiver "is imperatively required" (R. 96). This assertion is the conclusion of a number of preceding paragraphs setting forth the financial situation of the Interborough and duplicating in phraseology much of the allegations of the Brake Shoe bill.

Neither bill demanded a dismissal of the Brake Shoe suit or challenged the jurisdiction of the District Court to proceed with it.

The only difference between the Johnson and Boehm bills on the one side, and the Brake Shoe bill on the other, is that the former charge that the act of Judge Manton in appointing receivers was *coram non judice* by reason of "Rules" 1-a and 11-a. In consequence, they prayed that his order appointing receivers and his subsequent orders be set aside and that other receivers be appointed in their place.

Indeed, Judge Woolsey himself recognized and postulated throughout his opinion that the Brake Shoe suit was properly brought and properly invoked the jurisdiction of the Court. This was inherent in his order consolidating the two suits and in the reasons given by him therefor (R. 710-1); and indeed, was expressly declared by him in his opinion (R. 712):

> "There is not any question but that this Court had jurisdiction in Equity No. 7-364 (the Brake Shoe suit) of the subject matter of the litigation, for the necessary diversity of citizenship exists and the amount involved is far more than that required by the statute.

"Furthermore, there is not any question but that this Court had personal jurisdiction of the parties in Equity No. 7-364 (the Brake Shoe suit). The Interborough Rapid Transit Company appeared generally and joined in the complainant's prayer for the appointment of a receiver and the Manhattan Railway Company intervened in the proceeding and prayed for the extension of the receivership to it.

"Thus far the usual questions of jurisdiction were solved by the parties unaided, and the cause became effective as a basis for judicial action by this Court when the papers were filed in the office of the Clerk thereof.

"When we come, however, to the making of the receivership orders there is another and a very unusual question of jurisdiction involved; that is, whether the exercise of the jurisdiction came within the judicial competence of the judge who purported to exercise it."

On the argument, Judge Woolsey stated that there was no issue of "collusion" before him and that "the *sole* question" was "the legality of Judge Manton's actions in those orders that he entered" (R. 848, 849). Counsel for the petitioners agreed with him, and Mr. Boehm stated (R. 850):

"Mr. Boehm: May it please your Honor, I think your Honor is entirely correct in stating that the *only* question involved upon this motion is whether or not Judge Manton had the power to make the two orders which have been referred to, and whether, as a result of the two orders that he made he had the power to entertain the application of the Interborough Rapid Transit Company, or rather the American Brake Shoe & Foundry Company, for the appointment of a receiver of the Interborough Rapid Transit Company, and subsequently to permit the

> intervention of the Manhattan Railway Company and the application in that action for the appointment of a receiver of the Manhattan Railway Company."

Thus, the attempt of the petitioners' counsel now to inject charges of collusion by making in their briefs assertions unsupported by their pleadings or by the record is contrary to the position which they themselves took before Judge Woolsey, and is directly contrary to their acknowledgment then made of the *sole* issue to be considered.

(2) Certainly these petitioners cannot urge that the defendant Interborough should, in the Brake Shoe suit, have sought to deny the very facts which these petitioners allege in their own bills of complaint as furnishing urgent reasons for the appointment of receivers. Those facts abundantly prove that any demand by the defendant Interborough that the Brake Shoe plaintiff should first exhaust its legal remedies would have invited irreparable injury to all those whom the defendant had a duty to protect. The allegations in the petitioners' own bills of complaint show that it was the duty of the defendant Interborough to consent to an equity receivership and not to allow its assets to become mere prizes in a creditors' race.

Indeed, the present brief for the petitioner Boehm expressly concedes (p. 26):

> "Petitioners however were not challenging the propriety of the appointment of receivers for the Interborough. They were willing to concede that a receivership for the Interborough would be proper."

Perhaps no better answer can be given to the loose charges now made in the petitioners' briefs than to quote

as follows from the brief below of Louis Boehm, counsel for Lillian Boehm, in the Circuit Court of Appeals (pp. 80-81):

> "What stronger case could be presented for the intervention of a court of equity than this? This is essentially a case where a court of equity should and must intervene to protect the rights of the company, its security holders and of the public at large.
>
> "The Interborough fully recognized the validity of this statement. It filed its confession, in the Brake Shoe case, of insolvency and its admission that a receiver is necessary for the protection of everybody concerned. This court deals with substance and not with form. That consent was not given merely for the benefit of the Brake Shoe Company to assure it of the payment of its trifling $27,000 claim. *That confession was made and that consent was given because it was to the interest of the Interborough and of every one of its stockholders and creditors, as well as of the public at large, that receivers should be appointed.*"

In consequence, the same brief on the same pages argued that this very consent (which the petitioners now charge to have been collusive) was equally available to the plaintiffs Johnson and Boehm as a waiver of their lack of a judgment or of a return of an execution *nulla bona*. To quote the conclusion of Boehm's then argument on this subject (p. 81):

> "We respectfully submit that that confession and consent was given for the benefit of all creditors and every stockholder of Interborough, as well as for the benefit of the public at large. The Brake Shoe Company certainly could not benefit any more by that consent than any other creditor."

(3) Both Johnson and Boehm themselves have, at the very best, only the position of simple contract creditors seeking an equity receivership. Hence, it scarcely lies in their mouths now to claim that the Brake Shoe Company was guilty of collusion because it too was merely a simple contract creditor.

(4) The claim in the supplemental bill of Johnson that Roberts knew long in advance of the application for a receivership of the Interborough and of the subsequent application for a receivership of the Manhattan, and that the same were brought about "pursuant to an understanding or conspiracy of which the said Roberts had knowledge" (R. 70), is neither any allegation nor proof that the institution of the Brake Shoe suit was collusive in the sense of being fraudulent either in fact or in law.

These allegations in this supplemental bill are directed throughout to the appointment of Roberts as receiver of the Manhattan,—an appointment which was not sought in the Brake Shoe suit as first instituted, for the Manhattan did not intervene therein until some ten days after its commencement (R. 180, 196).

(5) The further charge now made in the briefs of petitioners' counsel that the Brake Shoe suit was started with some ulterior purpose of bringing about an unjustifiable disaffirmance of the Manhattan lease is fully answered and negatived by the Johnson bill of complaint itself, which prays for the appointment of receivers of the Manhattan as well as of the Interborough (R. 43), and which says (R. 42):

> "Interborough's receivers are in duty bound to protect its security holders and stockholders from further heavy losses. Interborough can in all probability be saved from further loss by the disaffirm-

> ance of the lease. There is, therefore, in view of the premises an imperative, urgent and immediate need of an independent and proper receiver and/or receivers being appointed to protect the interests of the Manhattan."

Indeed, at another point the Johnson bill of complaint directly asserts that "*Manhattan should be left to its own destinies*" (R. 40).

Again, Johnson's bill further alleges (R. 39):

> "If the Manhattan lines apart from the extensions are responsible for part of this enormous deficit *the Interborough receivers must promptly disaffirm the Manhattan lease.*"

(6) Furthermore, the trustees and committees for the bondholders and noteholders who, according to the Johnson and Boehm bills of complaint, were about to institute foreclosure and seek the appointment of receivers by the state courts, have all intervened in the Brake Shoe suit and are supporting the receivership.

In consequence, all interests, including the District Court itself (R. 712), have acknowledged the full jurisdiction of the District Court in the Brake Shoe suit. Hence, no question as to the power of that court in a suit by a simple contract creditor and no question of collusion in the institution of the suit is presented by the record, is before this Court or is involved in any way in the single question which this appeal presents.

We need not, therefore, enlarge upon the further and additional considerations that the propriety of appointing receivers in a suit of a simple contract creditor, consented to by the defendant, is a question which can be raised solely

in the Brake Shoe suit itself and not in a collateral suit; and that the charge of collusion also cannot be presented collaterally.

(7) If these petitioners felt that the institution of the Brake Shoe suit or the original appointment of receivers therein was collusive, they were given ample opportunity to present their charges upon the return of the respective orders to show cause, of which orders they had ample notice. That they chose to ignore this opportunity reflects upon the good faith of their present charges and proves those charges to be irrelevant here. (See Point VII of this brief.)

(8) Moreover, since bankruptcy was not in 1932 an open remedy in the case of a railroad and since it is the duty of a railroad in the financial situation of the Interborough to preserve equality among its creditors and to hold them off in the interest of continued performance of its public service, a consent to a creditor's bill which sets forth its financial situation truly and reflects correctly the necessity for a receiver is not tainted with collusion in any actual or legal sense at all. (*Ex parte Relmar Holding Co.*, 61 Fed. (2) (C. C. A. 2nd) 941; certiorari denied, ... U. S. .....).

CONCLUSION.

The decree of the Circuit Court of Appeals should be affirmed.

Dated, New York, N. Y. April 15, 1933.

Respectfully submitted,

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